THE WORKER AND THE CONSTITUTION: A THEORY OF CONSTITUTIONAL LABOUR LAW

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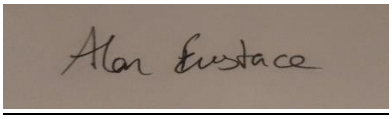

Alan Eustace

Summary

This thesis constructs a theoretical justification for the phenomenon of 'constitutional labour law' – that is, legal decisions about the interaction between constitutional norms, including human rights, and the labour relationship. Specifically, it answers the research questions of: why, and how, should courts intervene in the labour relationship on the basis of constitutional norms? The primary method pursued to answer these research questions is applied normative political theory: the analysis of concepts within constitutional theory and the development of a normative theory pertaining thereto, followed by analysis of doctrinal legal material in light of this theoretical framework. The thesis examines existing literature on the subject of constitutional labour law, which approaches the question from the perspectives of 'labour rights are human rights' and 'human rights at work'. Ultimately, the thesis concludes that neither perspective adequately explains and justifies constitutional labour law. Therefore, a new theory is needed that will be more descriptively convincing, and more normatively compelling, to fill this 'justification gap'.

The thesis argues that the concept of citizenship gives us a normative basis for making legal decisions about the interaction between constitutional norms and the labour relationship, providing theoretically robust answers to the central research questions. The ability of workers to function as citizens outside the workplace is influenced by what goes on in the workplace and by their relationship with an employer. The condition of 'submission and subordination' to which workers are subject on a day-to-day basis inhibits them from nurturing the 'habits of democracy' necessary to function as citizens. Moreover, workers are dissuaded from exercising their political and civic rights, including to freedom of expression and association, privacy, and the practice of religion or belief, for fear of employer sanction. There is a risk workers will only exercise their political rights in ways that benefits their employers' ends and interests, diminishing the political power of workers, and enhancing that of employers. That leads to the systemic disenfranchisement of workers and potential capture of state institutions by employers. In order to develop this theory, the thesis examines the pluralist normative foundations of labour law to find the emancipation of workers as citizens among the aspirations of the discipline; it then constructs a conception of citizenship to function as a normative ideal for the theory; and it examines the influence of the labour relationship on the citizenship of workers to extract a doctrinal programme for constitutional labour law. Constitutional labour law must, this

thesis argues, provide for the following: worker organisation, representation, participation and fair procedures in decision-making; dedicated public labour-related decision-making institutions and processes; and protection for civil liberties at work and against discrimination. Rights granted to workers in each of these areas must be capable of overriding contrary provisions in contracts of employment, because there is a public interest basis for their protection that would be undermined by individual waivers. These rights must apply even against private employers, because of the threat private power can pose to workers' citizenship.

The thesis examines case law from Ireland and Europe to draw lessons on the implementation of this programme. There are three specific manifestations of participation required in constitutional labour law: labour representative organisations, fair procedures in disciplinary proceedings, and subsidiary regulatory institutions. The thesis uses Irish constitutional jurisprudence to illustrate practical issues in respect of participation internal to the workplace – both collective in the form of trade union activity, and individual in the form of fair procedures – and outside the workplace, in the form of subsidiary regulatory institutions. It then turns to the value of political independence, basing it on four elements: contestation, diversity, moral independence and integrity. Together these are presented as justifying rights of workers against employers to freedom of expression, the free practice of religion or philosophical belief, and privacy. The thesis then draws on case law from the European Court of Human Rights to illustrate the sorts of civil liberties issues that crop up in constitutional labour law, and how to balance and adapt these rights in the context of employment. It argues that constitutional labour law should resist the tendency of employers to impose constraints on the moral and political beliefs or actions of their workers. It is sceptical that worker's moral beliefs, religious practices or political activity pose a serious risk of disruption to the productive process, the ultimate concern of the capitalist enterprise. Such disruptions as do arise should be managed by greater worker participation in internal decision-making. The law should not privilege the decisions of autocratic managers; the more management reserves the power to set working conditions to itself, the more it should be obliged to accommodate workers' civil liberties. The approach of this thesis would therefore incentivise employers to be more democratic, demonstrating the complementarity of the values of participation and political independence, and their cumulative importance to the normative ideal of citizenship for workers – and thereby to the preservation and promotion of democracy in the state.

Acknowledgements

The purpose of labour regulation is to improve the lives of the inhabitants of the world, insofar as work has something to do with it.[1]

Whatever small contribution this thesis might make to that lofty purpose, I cannot even claim all the credit for it. A comprehensive list of people who have helped me get to the stage of completing a PhD could easily be as long as the thesis itself; what follows is an attempt to reflect the most important. Of course, notwithstanding all these contributions of others, all errors and omissions remain my own (in life as in law).

If it takes a village to raise a child, it takes a faculty to raise a PhD student. In my case, it took two. Sincere thanks to all my colleagues at the School of Law, Trinity College Dublin (including the many fellow doctoral candidates I had the pleasure of meeting over the years) and Magdalen College, Oxford for supporting me on this journey. Of course, the deepest gratitude is reserved for Mark Bell and Rachael Walsh, my indefatigable supervisors, for their guidance, encouragement and patience. Almost as important as their feedback on this thesis have been the examples they offered in academic rigour and professional virtue. They have left me with lasting impressions as professional role models.

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[1] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 112.

been impossible without the love and support of Sheila Eustace, Matthew Eustace and Kate Nolan – though I'm sure each of them is thoroughly glad it's over. Among my wider family circle, I want to credit Elizabeth Cotter, who was the first person I ever knew to get a doctorate and has always been an inspiration to me – not least in my probably doomed attempt to catch her for postnominal letters.

Finally, this thesis is dedicated to the memory of my father, Tony Eustace. In work as in leisure, he brought joy to so many lives, not least mine. Nobody in his profession was ever more apt to be called comforter, philosopher, and lifelong mate. All that I am is the fruit of his labours.

St Valentine's Day 2023

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European Social Charter
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International Covenant on Economic, Social and Cultural Rights
Universal Declaration of Human Rights

PART

I

CHAPTER 1:

INTRODUCTION, METHODOLOGY AND STRUCTURE

Introduction

Angela Gibbins was an executive at the British Council,[1] an organisation responsible for promoting British culture and education around the world. Its patrons were the British Queen and her son, the Prince of Wales. Ms Gibbons was referred to at work as 'the red under the bed' and 'the quiet Corbynista',[2] on account of her being well-known as a committed republican (in the sense that she did not believe the United Kingdom should have a monarch) and socialist. Although she declined to attend work functions where the British Crown was represented, there was no suggestion she had performed her duties otherwise than perfectly satisfactorily.

Ms Gibbins posted a comment on social media that was critical of a young member of the British royal family.[3] After someone else had called the then-two-year-old prince a 'dickhead', Ms Gibbins accused the child of having 'white privilege', and compared his position to that of a young Syrian refugee who had drowned trying to reach the EU, an event that had been covered widely in the media.[4] She then stated: 'I'm sound in my socialist, atheist and Republican opinions. I don't believe the Royal family have any place in a modern democracy, least of all when they live on public money. That's privilege, and it needs to end.' Ms Gibbins was dismissed from her job, and the dismissal was upheld by the UK Employment Tribunal.

Many people will have no problem with this outcome. They might point out that Ms Gibbins knew when she took the job that her patron was the British monarch, and that her

[1] What follows is taken from *Gibbins v British Council* [2017] UKET 2200088/2017. The choice to open with a first-instance decision from the UK might be questioned, given that the remainder of the thesis will refer very little to UK law. All that can be said in response is that this case was chosen because of its interesting fact pattern; as will be explained in the Methodology section, case law is used in this thesis merely to illustrate underlying theoretical issues and their potential practical implications.
[2] [2017] UKET 2200088/2017, [17]; a reference to then-leader of the UK Labour Party.
[3] Ms Gibbins' comments came to attention after the tabloid press reported about it – inaccurately, as it turned out. Some of the media coverage was criticised by the ET as a 'spiteful hatchet job': see [2017] UKET 2200088/2017, [58].
[4] [2017] UKET 2200088/2017, [19]-[22].

contract would surely preclude any criticism of the royal family – entirely reasonable, in light of the goals of the organisation.[5] Even if that was not specified in her contract, she had created a media storm that caused a 'loss of reputation [which] maimed the organisation'.[6] An employment lawyer might even throw in that she had breached an implied duty of loyalty, or had lost her employer's trust and confidence. Others may find the content of what she said offensive or upsetting: 'she had associated herself with a distasteful and personal attack on a small child'[7] and failed to respect the 'dignity' of others.[8] To anyone who might have qualms about Ms Gibbins' right to freedom of expression they might respond, why should employers care about human rights? And even if the British Council was subject to human rights constraints as a *public body*, surely a *private* employer would be entitled to fire Ms Gibbins? If employers have to protect their workers' human rights, where does that end? There are so many human rights instruments out there, with dozens of rights contained in each – how could we decide which rights employers should have to respect? And at what cost to their business interests, and the rights of their owners, customers, other workers, *etc*?

This thesis is far from the first time these questions have been examined. As will be seen later, scholars and courts have spilled veritable oceans of academic and judicial ink on these issues. There is enormous public interest and political salience too: this thesis is no partisan tract for one side or the other in the 'culture wars', but it would be foolish to ignore the fact that politics has increasingly found its way into the workplace in recent years. One does not need to see (nor seek) 'cancellation' around every corner to recognise that in the present moment, the professional is political. This is part, of course, of a broader context in which many Western societies are struggling to find a way of living together, in circumstances where social trust has fallen, political co-operation is largely absent, and political discourse has assumed (with only some justification) a distinctly existential tone. It is fair to say this tone particularly marks contemporary debates around race, gender, sexual orientation and religion; what some see as the front line between discrimination and freedom of expression.[9] Some of this reflects an underlying concern that the form of liberal democracy many had taken for granted across the West in recent decades is in the process of collapse.

[5] [2017] UKET 2200088/2017, [118].
[6] [2017] UKET 2200088/2017, [83], [107].
[7] [2017] UKET 2200088/2017, [110].
[8] [2017] UKET 2200088/2017, [121].
[9] Some of these issues will be touched on, tangentially and (one hopes) sensitively, in Chapter 10.

Meanwhile, there is widespread fear about inequality and the stratification of society. Labour organising and redistribution are back in vogue, and people are interested in new kinds of relationship between workers and employers. Of course, there has always been concern about the imbalance of power between workers and employers, one response to which has taken the form of legal regulation of the labour relationship. The respective statuses of worker and employer depend on institutionalised authority or hierarchy. The labour relationship is '[i]n its inception [an] act of submission, in its operation [a] condition of subordination'.[10] Regulation is traditionally aimed at reducing the scope of that authority: offsetting the imbalance of power by setting limits to the substantive outcomes that management of businesses can decide. Thus it is not open to management to offer wages below a certain minimum, or working conditions that imperil health and safety. The state, a higher authority than employers, steps in to impose conditions on the employers' authority over workers. Such regulation is necessary because in the workplace, employers and workers are not equals.

Conversely, there is a widespread assumption in Western liberal democracies that *outside* the workplace, in the 'public square', social relations and the political process, workers and business owners are (or should be) equal in certain important respects. We have an ideal vision of citizenship, that everyone has the right to participate in decisions that affect their lives, share their views and attempt to persuade others of their merit, and form organisations to advance causes they believe in. Under this ideal, citizens are entitled (and indeed expected) to think carefully about social and political issues, inform themselves, discuss with others, and come to reasoned judgments that inform political and social behaviour. We also expect citizens to 'live their values', be they derived from political or moral philosophy, religious faith, or *ad hoc* but no less significant personal conviction on particular social issues. By this they offer examples to others and diverse perspectives on important questions that society must determine, collectively and democratically. They should engage with their fellow citizens on the basis of good faith attempts to share beliefs and values, openness to persuasion by others, and collaboration in the pursuit of political

[10] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18. Of course, the changing nature of work is another rich seam in contemporary labour scholarship: see, for example, Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019). The effects of technological innovation, changing patterns of global trade, developments in corporate structuring and forms of ownership and control, and financialisation, are broadly beyond the scope of this thesis. All of these affect managerial incentives, but the underlying power dynamic remains.

goals. They should not leverage their wealth or status to exclude others from decision-making, nor seek to accrue unjustified power over institutions of governance. The exercise of power must be accountable to the citizens it governs.

Of course, this is not only an idealised vision of democratic citizenship, but a contestable one. Later chapters will make the case that it has sound roots in political theory, and is normatively desirable as a conceptual framework. The thesis will ultimately make the argument that this ideal of citizenship gives us a basis for making decisions about the interaction between what this thesis calls 'constitutional norms' (which include human rights) and the labour relationship, providing theoretically robust answers to the questions posed above, and many more besides that have been elaborated in the literature. The existing academic literature, to be canvassed in the next chapter, suffers from a number of flaws in its efforts to develop a theoretical account of the law in this area. Examples abound of attempts by various courts to extend the sort of protections normally offered to citizens by constitutions into the workplace, some of which will be considered in Part III. But both legal decision-making in practice and academic scholarship is stymied by a failure, in the view of this author, to develop a convincing theory of constitutional labour law.

The most important insight, which will be developed in this thesis into a more compelling theory than is currently available in the literature, is to recognise that the labour relationship and the status of citizenship are interdependent. The ability of workers to function as citizens outside the workplace is influenced to a significant degree by what goes on in the workplace, and by the conditions of their relationship with an employer. Likewise, seeing workers as citizens demands that working conditions and relations fit a certain model, that respects the social and political status of citizenship. This has two elements that are mutually-reinforcing: first, the condition of 'submission and subordination' to which workers are subject on a day-to-day basis inhibits them from nurturing the 'habits of democracy' necessary to function as citizens. Second, worker-citizens are dissuaded from exercising their political and civic rights, including to freedom of expression and association, privacy, and the practice of religion or belief, out of fear of the consequences should their boss find out and disagree with them. There may even be an incentive for workers to exercise their political rights in ways that benefits their employers' ends and interests. This could only diminish the political power of workers, and enhance that of employers. At a systemic level, that tends towards the disenfranchisement of workers and

the capture of state institutions by employers. It is not putting it too starkly to worry that liberal democracy risks sliding towards plutocracy, in the absence of protection for workers' citizenship within the labour relationship.

The form this protection takes may well vary across jurisdictions. This thesis is concerned with a specific phenomenon observable in court cases, which it calls 'constitutional labour law'. The following chapters will construct a theoretical defence of this practice, which ought to shape its development in future, drawing on a range of examples of court cases to illustrate its actual and potential impact. But first it is necessary to offer a brief explanation of what is meant by 'constitutional labour law'.

Constitutional labour law

Constitutional labour law can be defined from either a labour law or a constitutional law perspective. The labour law perspective considers there are two levels of labour law. 'Ordinary' labour law consists of those statutes, doctrines and legal principles which form the 'bread and butter' of labour law practice – including the terms of employment contracts, minimum wage and working time legislation, health and safety protections, unfair and wrongful dismissals, *etc*. This thesis does not make the claim that this 'ordinary' labour law is unaffected by constitutional norms – indeed, in jurisdictions which align in practice (if not explicitly) with Kumm's theory of the 'total constitution',[11] it will be hard to find any area of law which does not have to conform to constitutional principles.

Rather, constitutional labour law is that portion of law which is generated by the decisions of constitutional courts considering labour issues in terms of constitutional norms, the latter included in or derived from the text of constitutional documents (broadly defined).[12] The thesis will take a broad view of constitutional courts, which it defines on a functional basis. Therefore, it includes not only Kelsenian constitutional courts, standing apart from the ordinary judicial system, but also superior courts in jurisdictions with a fused judicial system (such as Ireland and the UK), and dedicated human rights courts like the European

[11] Matthias Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341.
[12] Constitutional documents, for the purposes of this thesis, include the European Convention on Human Rights (ECHR).

Court of Human Rights. These courts have jurisdiction, within their respective legal orders, to make determinations of constitutional norms and to set out legal doctrine grounded in those norms.[13] When they do so in the context of a labour-related issue, this amounts to constitutional labour law.[14] Why the particular jurisdictions to be examined have been chosen will be explained later in this chapter.

From a constitutional law perspective, and to some extent within a labour law paradigm as well,[15] the phenomenon of constitutional labour law has thus far been explained on the basis that 'work' is merely the factual context in which a constitutional or human rights claim has arisen. This thesis will challenge that characterisation, arguing instead that the labour relationship is one of specific constitutional concern, and criticising constitutional courts for failing to consider it as such. The Sources section later in this chapter will explain further the choice of case law and other material for study. First, it is necessary to very briefly situate the scope of inquiry for the thesis, and identify the phenomenon that demands explanation and justification. The discussion here will be brief because the next chapter will engage closely with the relevant literature in this field.

Existing scholarship: context and justification gap

The growing body of cases emerging from constitutional and international human rights courts which originated in labour relationship disputes – 'constitutional labour law' – is viewed with scepticism in some corners of both labour law and constitutional law scholarship, for reasons which will be outlined presently. As will be detailed in Chapter 2, other commentators, and courts themselves, have justified these decisions in accordance with the 'labour rights are human rights' and 'human rights at work' paradigms. However,

[13] It should be noted, therefore, that this definition does not limit the field of inquiry to *apex* courts, whose decisions about constitutional norms are supreme within their jurisdiction. Non-apex courts which nonetheless have jurisdiction to determine constitutional norms, such as the Irish High Court, are also included.

[14] This boundary between ordinary and constitutional labour law is blurred by some constitutional courts. For example, decisions of the Court of Justice of the European Union like C-144/04 *Mangold*, C-414/16 *Egenberger* and C-609/17 *TSN* suggest that the Court occasionally views EU legislation as 'defining' the constitutional (ie Treaty or Charter) right, and that the content of the right could be altered by amending the legislation. A similar point can be made in respect of some decisions of the Supreme Court of Canada, like *Mounted Police Association of Ontario v Canada* [2015] SCC 1; see the commentary of Brian Langille, 'Why are Canadian judges drafting labour codes – and constitutionalising the Wagner Act model?' (2009) 15 Canadian Journal of Labour and Employment Law and Policy 101.

[15] Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) Modern Law Review 619.

these fail both to explain the empirical reality of these cases, and to provide a robust theoretical framework to support intervention by constitutional courts in labour relations. This thesis will offer an alternative theory that is both more descriptively convincing and normatively desirable. First, to presage the discussion in Chapter 2, it is worth summarising the academic discussion to which this thesis contributes.

From the labour perspective, constitutional labour law generally arises either from workers (and their organisations) taking constitutional cases to advance their cause,[16] or from employers attempting to invalidate or otherwise frustrate worker-protective state measures or industrial action.[17] Much of the scepticism about constitutional labour law comes from this prospect of it being a double-edged sword. Worse, it is suspected that constitutional litigation undermines worker solidarity and collective or political action.[18] Many labour lawyers continue to resist the view that 'labour rights are human rights' except at a high level of abstraction,[19] and some scholars go so far as to say that labour law and human rights law are pursuing fundamentally different aims.[20] In response, other labour lawyers have defended the use of constitutional litigation as a *means* to advance the cause of labour,[21] and also argued that the protection of human rights in the labour relationship is a *legitimate concern* for labour law.[22] Some have gone so far as to argue that labour law can be *derived* from human rights, or at least the same underlying values.[23]

[16] For example: *Meskell v Córas Iompair Éireann* [1973] IR 121; *Köpke v Germany* Application no 420/07; *Bărbulescu v Romania* Application no 61496/08; *López Ribalda v Spain* Application no 1874/13.
[17] For example: *Ryanair v Labour Court* [2007] IESC 6. Or indeed, workers taking cases that may be perceived to undermine worker protection, such as breaking a closed shop; these will be returned to in Chapter 7.
[18] Jay Youngdahl, 'Solidarity first: labor rights are not the same as human rights' (2009) 18 New Labor Forum 31; Guy Mundlak, 'Human rights and labor rights: why don't the two tracks meet?' (2012) 34 Comparative Labour Law and Policy Journal 217.
[19] See, for example, Alan Hyde, 'The Idea of the Idea of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in the same volume, ch 9; Joe Atkinson, 'Human Rights as Foundations for Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7.
[20] Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8(2) Theoretical Inquiries in Law 719.
[21] Hugh Collins, *Employment Law* (Oxford University Press 2010) ch 10 and sources cited therein; *Demir and Baykara v Turkey* Application no 34503/97.
[22] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[23] Discussed in Joe Atkinson, 'Human Rights as Foundations for Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7.

Meanwhile, constitutional scholarship approaches constitutional labour law on the bases that, first, some rights in constitutional documents explicitly relate to the labour relationship;[24] and second (where some horizontal application of rights is accepted), human rights generally may be equally imperilled by employer action as state action.[25] As such, the protection of 'human rights at work' is a result of work simply being the *context* in which a human rights claim has arisen.

As will become clear in the course of Chapter 2, neither labour nor constitutional scholarship has yet to convincingly justify constitutional labour law. Constitutional labour law exists in a 'justification gap', between labour and constitutional theory. First, the idea that constitutional litigation is a useful means to advance the cause of labour is results-contingent. It also fails to account for strategic use of constitutional litigation by employers, and ultimately fails to articulate a theoretical or normative framework for constitutional labour law and its proper place in labour law. It fails to explain why constitutional courts *should* protect workers, being content to celebrate those occasions when they *do* and decrying those when they do not.[26]

Second, it is difficult to conceive of every demand of labour as a human rights issue without either devaluing rights-talk or limiting the demands labour can legitimately make to those which clearly manifest a human rights concern. As such, constitutional labour law would seem to offer protections to workers only *in extremis*. Third, there are many human rights instruments which contain socio-economic rights of great concern to labour (like Article 23 UDHR,[27] the right to a decent wage). Even accommodating many civil and political rights might put significant strain on private employers, and radically alter existing labour relations.[28] Most constitutional courts show no signs of willingness to enforce many of these rights against employers (for a variety of practical and political-legitimacy reasons), nor to impose all the same human rights duties on employers as on the state (even in

[24] Pablo Gilabert, 'Labor human rights and human dignity' (2016) 42 Philosophy and Social Criticism 171; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[25] *Meskell v Córas Iompair Éireann* [1973] IR 121; *Köpke v Germany* Application no 420/07; *Bărbulescu v Romania* Application no 61496/08; *López Ribalda v Spain* Application no 1874/13.
[26] *Cf* KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39(1) Industrial Law Journal 2, and Alan Bogg and KD Ewing, 'The Implications of the *RMT* Case' (2014) 43(3) Industrial Law Journal 221.
[27] Universal Declaration of Human Rights.
[28] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3.

jurisdictions where some horizontal application of human rights is accepted). If constitutional labour law is to consist of *some* human rights at work, the question remains *which*, and *why*. A view of labour law as itself derived from human rights cannot explain this.

Fourth, these theories pose challenges for the very basis of labour law itself. As will be discussed in Chapter 3, labour law's guiding narrative has always been that, faced with dramatic 'inequality of bargaining power', workers need collective action and protective labour law to secure material benefits, like higher wages, leisure time, and safe working conditions ('bread and roses').[29] On its face, constitutional labour law does not seem to have these demands at the forefront – there is little evidence of constitutional courts effecting material redistribution, and the legitimacy of such action is fiercely contested. Rather, there is more focus on 'civil liberties' like privacy and freedom of expression.[30] This seems to lend credence to the view that a human rights strategy distracts from the core aims of labour law, and that constitutional litigation is an unreliable means to an uncertain end.[31]

There are also problems from a constitutional perspective. First, there is the problem that in the employment context, a worker will generally have *consented* to the interference with his rights, by agreeing to the employment contract which provides for the actions of an employer which amounted to the breach of rights. Second, the question of horizontality has received considerably more attention from constitutional scholars. Much scholarship, and constitutional law in many jurisdictions, is actively hostile to the horizontal application of human rights of any kind, least of all in private relationships like employment. Ultimately, this raises the question of what is the constitution *for* – to protect the citizen against the state, or protect workers from bosses (or indeed, protect bosses from workers, as some cases

[29] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7; Manfred Weiss, 'Reinventing Labour Law?' in the same volume, ch 3; Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8(2) Theoretical Inquiries in Law 719. The phrase 'bread and roses' comes from American suffragette and trade unionist Helen Todd, immortalised in John Oppenheim, 'Bread and Roses' (1911).

[30] This might be an overstatement. Much constitutional labour law (and, for that matter, non-constitutional labour law) concerns the rights to freedom of association and to collective bargaining and action (surely a core demand of labour law), and to fair procedures in discipline and dismissal. In the labour law narrative, however, these may be considered instrumental to the end of material benefits.

[31] Discussed in Joe Atkinson, 'Human Rights as Foundations for Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7, 126.

do)? Is the labour relationship particularly apt for horizontality, and why? Although some constitutional documents contain some socio-economic rights, the claim that constitutions pursue the same (re)distributive goals as labour law is hard to make.[32] Any theory justifying constitutional labour law will have to overcome these objections, and fill the 'justification gap'.

Having set out the context for and scope of the inquiry, the remainder of this chapter will define the central research questions for this thesis, discuss and defend the methodological approach to the research and the sources to be drawn on, and finally set out the structure for the thesis itself.

Central research questions

At one level, the central research questions of this thesis can be stated with concision: **why, and how, should courts intervene in the labour relationship on the basis of constitutional norms?** In other words, **what is the theory of constitutional labour law that courts should follow?** Both formulations require some unpacking before the research programme becomes clear. First, as established above, the thesis takes for granted that courts *are* intervening in the labour relationship on the basis of constitutional norms. Of course, this is another way of saying that *constitutions* are 'intervening' in labour relationships, in the sense that the norms contained therein are relevant to determining disputes that arise in the context of labour relationships. The 'labour question'[33] is a constitutional question. But this immediately raises the questions of *which* norms, in *which* constitutions, being used by *which* courts?

As will be explained in the Methodology section below, this thesis is not a project in comparative constitutional law nor in comparative labour law. It is a work of applied normative political theory – 'applied' in the sense that legal doctrine will be assessed in light of the theory developed, and (inevitably) will help to inform the development of the theory itself. Which again raises the question of *which* legal doctrine? In the section below on Sources, it will be explained that doctrine (that is to say, cases) from Ireland and the

[32] And indeed has been roundly rejected in some jurisdictions – see, for example, *TD v Minister for Education* [2001] IESC 101; *Sinnott v Minister for Education* [2001] IESC 63.
[33] TG Spyers, *The Labour Question* (Sonneschein 1894).

European Court of Human Rights will be relied on.[34] The Methodology section will explain to what use these cases are put in the thesis.

Second, we should clarify what is meant by 'constitutional norms'. As will be explored in Chapter 5, there is any number of things that may or may not be written in a document labelled 'The Constitution' in any particular jurisdiction.[35] However, this thesis does not follow a formalist approach in identifying constitutional norms. Rather, it takes the view that constitutional norms are those that determine the distribution of state power, and set limits on the exercise of public (and, it will be argued, private) power that are related to the role an individual plays within the structure of the state. They are 'fundamental' norms that condition what it means to be a 'citizen' of a state – on which more in Chapter 4. For the most part, as suggested above, the existing literature in this field has focused on human (or fundamental) rights, and their relevance to and impact on labour law. In Chapter 2, this trend will be assessed from the twin perspectives of 'labour rights are human rights' and 'human rights at work'. One respect in which this thesis offers an original contribution to the field is to demonstrate how human rights are only one subset of constitutional norms that are relevant to labour law. For that reason, the choice has been made to refer to the subject of the present enquiry as 'constitutional labour law'. This is inevitably abstracted from the particular norms, constitutional, labour or otherwise, of any single jurisdiction. As will be explained below, this is appropriate for a work of political or constitutional theory.

The thesis takes a number of further things for granted in embarking on the research questions posed above. It is assumed that it is possible to discern the normative underpinnings of the law from the outcome of one or more court cases, and the reasoning offered by courts for their decisions. This thesis engages only to a very limited extent in a critical examination of the socio-economic and cultural factors that shape judicial decision-making. It also eschews the pragmatist's view that legal decision-making is driven by contingent practical compromise or economic efficiency, and searches for a theory that both explains existing case law, and is capable of informing future decision-making. As will be explained below, this theory, and the thesis as a whole, will be explicitly normative

[34] In very limited circumstances, where it is necessary to illustrate a specific issue or perspective, an example from the United Kingdom or the Court of Justice of the European Union may be referred to. As set out below, cases are used as 'real-life thought experiments' in this thesis, so there is no reason to artificially limit the sources of examples where necessary to enhance the theoretical analysis.
[35] Or indeed, there may be no such document – as in the UK.

in nature – as acknowledged by the use of the word 'should' in the central research questions.

Answering the central research question: ethics, methodology and sources

Ethics

As will become clear from the analysis of methodology and sources to follow, no ethical considerations arise in respect of this research. All research material is from reputable online databases (open-source or subject to institutional subscription), or published academic literature. There are no human or animal research subjects.

Methodology

Theoretical work in labour law has been likened to asking the question of how many shop stewards can dance on the head of a pin.[36] If that is so, then a section on the methodology of theoretical work in labour law must be like asking the question of how to count the shop stewards dancing on the head of a pin. Nevertheless, it is important for this thesis to set out and defend its methodology because, as Ashcraft puts it: 'It is not difficult… to ferret out the confusions, logical errors, and philosophical absurdities which abound when one adopts uncritically a methodology whose philosophical premises have not been self-consciously stated and defended.'[37]

It is worth briefly recapping the distinction between method and methodology. The former refers to the tools or techniques employed in the research project; the latter to the approach to the research project, including the selection and justification of the method(s) used.[38] This section of the thesis is an exercise in methodology, in that it will explain the choice of research methods used in the thesis.

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[36] KW Wedderburn, *Employment Rights in Britain and Europe* (Lawrence and Wishart 1991) 95. Wedderburn also quoted with approval Ross and Hartman to the effect that industrial relations 'does not thrive on a diet of principles': see KW Wedderburn, *The Worker and the Law* (1st edn, Penguin 1965) 14.

[37] Richard Ashcraft, 'On the Problem of Methodology and the Nature of Political Theory' (1975) 3 Political Theory 5, 10.

[38] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 7, 108-09.

Although, as stated above, it is primarily a work of normative political theory, a variety of methods are employed at different stages in this thesis. Chapter 2 contains both a literature review of scholarship that approaches this topic from the two prevailing paradigms in the field, and a critical analysis of that scholarship as an exercise in normative political theory. This method is not just appropriate at an early stage to situate the thesis within a wider academic context, but necessary to identify the flaws in rival accounts of constitutional labour law that the theory advanced here will resolve. As such, Chapter 2 concludes with a set of questions to which the literature reviewed in that chapter does not provide satisfactory answers, which act as a springboard for the remainder of the thesis.

Part II (Chapters 3, 4 and 5) is more straightforwardly normative political theory. This method is defined by List and Valentini as: 'a subfield of philosophy and political science that addresses conceptual, normative, and evaluative questions concerning politics and society, broadly construed.'[39] This thesis falls into the tradition of analytic normative political theory because it is concerned with the analysis and construction of concepts – chiefly those of 'citizen' and 'citizenship'.[40] However, as List and Valentini note, 'Contemporary analytic political theory goes well beyond conceptual analysis',[41] and this thesis embraces the contemporary turn in respect of which 'the development of normative *theories* has been one of the field's central concerns.'[42] Although the normative implications of the concept of citizen(ship) elaborated in this thesis are wide-ranging, this thesis does not attempt to construct a comprehensive political theory. Such would be beyond the capacity of a doctoral thesis. Moreover, it would be unnecessary to explain the particular phenomenon under study, that of constitutional labour law. In part, this helps to distinguish the political theory elaborated here from the broader field of moral philosophy – although there are many questions of moral philosophy that arise in the context of the

[39] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 525.
[40] For more on analytic or conceptual philosophy, see Jeffrey C King, 'Philosophical and Conceptual Analysis' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 14. For a detailed commentary on one method for conducting conceptual analysis, on which more will be said in Chapter 3, see Yuri Cath, 'Reflective Equilibrium' in the same volume, ch 12.
[41] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 526.
[42] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 526 (emphasis original).

labour relationship, the theory elaborated here does not aim at a definitive resolution of these questions, but rather 'appeal[s] to people with a variety of (reasonable) viewpoints, precisely because those solutions are meant to apply to, and be acceptable in, pluralistic societies.'[43]

List and Valentini acknowledge that the distinction between political and legal theory is often difficult to draw, and are 'best seen as overlapping fields of enquiry'.[44] Clearly, this thesis examines legal doctrine and concepts, and as such could easily be characterised as a work of legal theory. It is worth considering it political theory for two reasons. First, List and Valentini suggest that most legal theory is jurisdictionally-bounded (*ie*, concerned with the interpretation of legal concepts within one legal system). Although this distinction would be helpful, since this thesis is not concerned with the interpretation of concepts within any particular legal system, it is unconvincing because a great deal of both special and general jurisprudence does not consider itself jurisdictionally-bounded.[45] The second distinction seems more sustainable: the concepts of 'citizen' and 'citizenship' are not legal terms of art; rather, they have broader resonance in the fields of political theory and science. Although this thesis does not examine the potential impact of the theory developed herein outside the context of constitutional labour *law*, it is likely to be of broader interest and relevance.

Nevertheless, the substance of the theory remains legal in nature – as will become clear in the discussion of the method deployed in Part III. As such, the thesis is best considered an exercise in 'interpretive constitutional theory', which is a subset of normative political theory as it applies to concepts that are relevant for constitutions, constitutionalism, and constitutional law. Barber explains:

> The task of social science… is interpretive: it aims to bring to light the sense and significance of social phenomena. A good interpretation of a phenomenon is one

[43] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 527.
[44] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 528.
[45] See Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25(4) Oxford Journal of Legal Studies 565.

> which illuminates its important features, explaining the part it plays within the life of a community… [and] showing the practice to have meaning, ascribing a unity to it, and drawing out its significance.[46]

The characterisation of law as a social science remains controversial;[47] certainly the endeavour of this thesis, like much political theory, is more humanitarian in nature.[48] This will be returned to below. Nonetheless, Barber makes it clear that interpretive theory is prior to any applied analysis, social-scientific or otherwise. Like Barber's work, the approach taken to interpretive constitutional theory in this thesis is 'cheerfully ecumenical'.[49] In particular, Part II does not confine itself to one overarching political theory in drawing support for the features of citizenship which are useful in understanding the concept for the purposes of explaining and defending constitutional labour law (more on this will be said in Chapter 4). The thesis also embraces Barber's 'slide from the descriptive towards the evaluative'.[50] Although he considers it an 'unhappy consequence' (if a necessary one)[51] 'that a theorist's account will be conditioned by her ethical beliefs',[52] the present author is less reticent about his normative commitments – as will no doubt become clear to readers in the course of the thesis. As Ashcraft explains, 'A theory is political… only in relation to the maintenance or furtherance of the social, political, and economic objectives of a specifically identifiable group within society.'[53] As such, it stands open to the charge of being not only political but *polemical*; as much an exercise in narrative as in analysis. The reply to this is that ideology-free interpretive theory is impossible;[54] this is all the more the case in constitutionalism and constitutional law, where narrative and political rhetoric are core aspects of decision-making, argumentation and justification, and the formation and reflection of public opinion.[55] It is always the case that in political theory,

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[46] NW Barber, *The Constitutional State* (Oxford University Press 2010) 3-4.
[47] Geoffrey Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67(2) Cambridge Law Journal 288.
[48] See Ruth W Grant, 'Political Theory, Political Science, and Politics' (2002) 30 Political Theory 577.
[49] NW Barber, *The Constitutional State* (Oxford University Press 2010) 1.
[50] NW Barber, *The Constitutional State* (Oxford University Press 2010) 10.
[51] NW Barber, *The Constitutional State* (Oxford University Press 2010) 12ff.
[52] NW Barber, *The Constitutional State* (Oxford University Press 2010) 11.
[53] Richard Ashcraft, 'On the Problem of Methodology and the Nature of Political Theory' (1975) 3 Political Theory 5, 20.
[54] NW Barber, *The Constitutional State* (Oxford University Press 2010) 12. For a broader discussion on this theme, see Tarunabh Khaitan, 'On scholactivism in constitutional studies: Skeptical thoughts' (2022) International Journal of Constitutional Law <https://doi.org/10.1093/icon/moac039> accessed 19 August 2022.
[55] See for discussion: Peter Brooks, 'The Rhetoric of Constitutional Narrative: A Response to Elaine Scarry' (1990) 2 Yale Journal of Law and Humanities 129; Stanley Fish, *There's No Such Thing As Free Speech (and*

'the ultimate motivation for our analysis may well be a normative or evaluative one.'[56] Furthermore, as Watkins and Burton point out, 'Every legal research project begins from a theoretical basis [whether] articulated or not… Whether or not the researcher is aware of it, her "world view" will influence every aspect of her research', and the choice of method is strongly influenced by the underlying theory.[57] This author is certainly no exception.

However, 'this need not cause us to provide an idealized interpretation of constitutional institutions'[58] and indeed 'theorists holding different ideological positions will find they agree about many of the significant features of constitutional institutions, [and] partial accounts of constitutional institutions [may] prove attractive to people holding a number of different ethical perspectives.'[59] As stated above and will become clear in Chapter 4, the development of a citizenship-based theory of constitutional labour law in this thesis draws on a number of intellectual traditions within political theory and jurisprudence.

Finally, Part III (Chapters 6 to 10) retains a significant element of political theory method, but in becoming *applied* rather than purely analytical, relies on extensive (though far from comprehensive) doctrinal legal analysis. It is trite to say that doctrinal legal analysis has long been considered to rest on uncertain methodological foundations.[60] Hutchinson defines doctrinal research as:

> [T]he research process used to identify, analyse and synthesise the content of the law… In this method, the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised

It's a Good Thing Too) (Oxford University Press 1994); Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996); Pierre Schlag, 'Normative and Nowhere to Go' (1990-1991) 43 Stanford Law Review 167 and 'Hiding the Ball' (1996) 71(6) New York University Law Review 1681; Richard Posner, 'Against Constitutional Theory' (1998) 73(1) New York University Law Review 1.

[56] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 27, 530. See also Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 565, 577.

[57] Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 2. Albert Sanchez-Graells. 'Economic analysis of law, or economically informed legal research' in the same volume, ch 8, 173 goes so far as to say: 'Law is not, and probably never has been, an independent field of study. When it was claimed it was, a deeper analysis would show that law scholars were making philosophical or even theological – dogmatic – analysis of normative statements or social norms settled down in a text.'

[58] NW Barber, *The Constitutional State* (Oxford University Press 2010) 12.

[59] NW Barber, *The Constitutional State* (Oxford University Press 2010) 11-12.

[60] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 2, 27.

> to establish an arguably correct and complete statement of the law on the matter at hand.[61]

Similarly, Kennedy offers:

> [A] detailed and highly technical commentary on, and systematic exposition of, the content of legal doctrine… The priority is to gather, organise and describe legal rules, and offer commentary upon the emergence and significance of the authoritative legal sources that contain these rules.[62]

Hutchinson argues that sound doctrinal research is always the basis of any theoretical work in law that hopes to be empirically accurate and practically useful.[63] If it is to go beyond 'case law journalism'[64] (which this thesis certainly aspires to), doctrinal research must 'restate' and 'recast' doctrine – ultimately aiming to 'offer a new framework or paradigm' for understanding the decisions of courts and other legal actors.[65] Likewise, Kennedy argues that 'doctrinal analysis is among the very best tools we have for operationalising our philosophical judgments about what law should be.'[66] As he points out, the best doctrinal research establishes an 'external value' by which to judge the law – which cannot be supplied by doctrinal research itself,[67] but rather must be found in some political theory. That is the project pursued in Part III of this thesis: the examination and analysis of select legal cases as examples of fact patterns in which the issues contained in the central theory

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[61] Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 1, 13.

[62] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 2, 22. See also Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) ch 1.

[63] Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 1, 10, 15.

[64] Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 1, 24.

[65] Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 1, 15.

[66] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 2, 27. *Cf* Anne Ruth Mackor, 'Explanatory Non-Normative Legal Doctrine: Taking the Distinction between Theoretical and Practical Reason Seriously' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing 2011) ch 3; Alex Langlinais and Brian Leiter, 'The Methodology of Legal Philosophy' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (Oxford University Press 2016) ch 34, 680ff.

[67] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 2, 35.

are relevant, and of judicial rhetoric that demonstrates normative approaches to those issues that are either compatible or incompatible with the theory. As adverted to above, this sort of research is better considered part of the humanities tradition than the social sciences. Cammiss and Watkins argue this is true of all doctrinal legal research, based as it is on textual analysis in context, aimed at revealing underlying ideologies and narratives, as part of the role played by law in human culture[68] – what O'Donovan calls 'the dark matter of [legal] reasoning'.[69]

We should be careful here not to over-egg the methodological pudding: this thesis does not aim at doctrinal comprehensiveness, rather focusing on select cases which are relevant to the issues discussed at a theoretical level. It remains at heart a theoretical project with a doctrinal component, rather than a work of doctrinal research in itself.

A similar caveat should be observed with respect to the comparative method employed in the thesis. Although drawing on doctrine from more than one legal jurisdiction, this is not a comparative project. Samuel warns against viewing mere reliance on examples from multiple legal jurisdictions as comparative research in itself, arguing that way lies the 'major danger… of superficiality'.[70] Nevertheless, all modern doctrinal research has some comparative element, even if just because so much legal decision-making involves comparative and international sources.[71] Paris argues there is no single comparative *method*, but rather that the 'strategic choice' to rely on 'foreign' legal material in any particular research project is justified by the overarching goal of the project.[72] Often, this is as simple as constructing arguments on how and why to improve, as the researcher sees

[68] Steven Cammiss and Dawn Watkins, 'Legal research in the humanities' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 4, 87-92. See also Geoffrey Samuel, 'Comparative law and its methodology' in the same volume, ch 6, 127-28 and Panu Minkkinen, 'Critical legal "method" as attitude' in the same volume, ch 7, 166; and further Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 1, 16-18.
[69] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 7, 116.
[70] Geoffrey Samuel, 'Comparative law and its methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) ch 6, 137.
[71] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 3, 40.
[72] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 3, 41, 45.

it, 'domestic' legal doctrine.[73] Given that the present thesis constructs a normative theory that may be applied in any jurisdiction in which (as will be elaborated on in Chapter 4) the concept of citizenship it relies on has socio-political salience, even this claim is too ambitious. Rather, the reliance on examples from various jurisdictions in this thesis are primarily offered as illustrations of how, and how *not*, to make decisions about labour issues in light of constitutional norms. As will be explained in Part III, the choice has been made to use two different sources of legal doctrine (Irish and European) to illustrate each of the twin normative values driving the citizenship-based theory of constitutional labour law developed in Part II: participation and political independence. Where there is critical commentary on these decisions, it is not on the basis of 'internal' doctrinal critiques – what O'Donovan calls the 'pedigree' rather than the 'merits' of decisions.[74] Rather, the decisions, and the normative commitments that are revealed by them, are discussed in light of the theory developed in this thesis. In turn, the theory is developed in light of the practical considerations that arise in the cases under discussion.

For any doctoral researcher in law, there is a perennial fear of 'doing two PhDs': one in law and one in, for example, philosophy, political science, sociology or economics.[75] Meagher speaks dismissively of law schools populated by 'multitudes of academic homunculi who scribble and prattle relentlessly about… non-subjects… [T]hey are failed sociologists.'[76] This author has no desire to join a similar multitude of failed philosophers. Though a work of applied normative political theory, it remains at heart a legal research project; one which is made 'meaningful', as Paris argues, by its tendency to offer a normative theoretical contribution to legal reform.[77] The 'cheerfully ecumenical'[78]

[73] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 3, 47-48.
[74] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 7, 114. See also Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings' in the same volume, ch 1, 9.
[75] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 7, 122, 125ff.
[76] Cited in Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 7, 122-23. Bizarrely, Meagher himself includes among his list of 'non-subjects': 'criminology, bail, poverty, consumerism, computers and racism'.
[77] Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 3, 46.
[78] NW Barber, *The Constitutional State* (Oxford University Press 2010) 1.

methodological pick'n'mix on display is characteristic of (non-empirical) legal research,[79] being an attempt to 'navigate the swampy textual lowlands of legal rules' while keeping one eye always on the normative high ground. Lawyers are, traditionally and of necessity, methodological magpies. That is a tradition in which this thesis is content to stand.

Sources

As stated above, this thesis draws extensively on secondary literature in the fields of labour law and constitutional theory: academic monographs, compiled books, journal publications and working papers. This is most heavily relied on in Part II of the thesis. Part III draws on legal doctrine in addition to theoretical secondary literature. At a very technical level, the method for selection of material is straightforward: recourse was had to both publicly-accessible databases of legal material (such as BAILII and HUDOC), and to databases of case law and academic commentary behind paywalls, but accessible to this author though the institutional libraries of Trinity College Dublin and the University of Oxford. Further recourse was had to hard copy academic books, either accessed through those same libraries or purchased by the author with financial support from the Irish Research Council and Magdalen College, Oxford. However, while the mechanics of accessing research material is certainly an important factor in determining the scope of any research project,[80] of more significance is the choice of *which* material to seek out and use.

It is fair to say that the selection of secondary literature for review in a legal research project is more art than science. As Snel and de Moraes explain, a review of secondary legal material is:

> …[a] necessary […] investigation prior to embarking on a larger academic research venture. The main purpose here is to provide a critical account of the literature in a particular area in order to demonstrate why a new study is required. In other words, to *embed* and *justify* a proposed research question.[81]

[79] Rónán Kennedy, 'Doctrinal Analysis: The Real "Law in Action"' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) ch 2, 26.
[80] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) ch 4.
[81] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 7 (emphasis original).

In many ways, the review of academic commentary on a particular topic is logically prior to the research project *stricto sensu*, because only by a review of existing literature can a question worthy of research be identified.[82] Assessment of existing scholarship is necessary to (a) understand the field of enquiry; (b) narrow down the proposed topic to 'researchable proportions'; (c) situate the precise research question within the field and broader scholarship; (d) justify the choice of this research question and the effort required to answer it – that is, identifying the original contribution the thesis will make to scholarship, and the significance of that contribution in the field; and (e) estimate how best to go about answering the question and the time and resources necessary to do so.[83] As such, although a 'systemic' review and 'critical appraisal'[84] are conducted in Chapter 2, the preliminary work of reviewing this literature took place well in advance of even submitting the PhD proposal. Fundamentally, a literature review (for a doctoral thesis making an original contribution to the field) is about '*finding* a research question, not *answering* one'.[85] As will become clear by the end of Chapter 2, there are a number of questions left unanswered in the current scholarship on constitutional labour law, such that the theory developed in this thesis and the analysis of doctrine conducted in light of that theory in Part III are highly original.

As for how the literature relied on in this thesis was selected: it represents the most high-profile and cutting-edge scholarship in the fields of study relevant to this thesis, to which the thesis itself aims to contribute. There is no accepted *a priori* method for the selection of relevant secondary material (or, for that matter, primary doctrinal material such as is canvassed in Part III) in legal research.[86] This is particularly true of the sort of legal research project this thesis represents: while Snel and de Moraes argue that generally, legal research projects should focus on commentary by *legal* academics,[87] this thesis inevitably casts the

[82] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 13.
[83] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 13ff.
[84] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) ch 5.
[85] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 22 (emphasis original).
[86] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 40.
[87] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 40-41.

net wider to include works of pure normative political theory, which has not necessarily been applied by other scholars to legal contexts and doctrinal material. Snel and de Moraes advocate a 'snowballing' approach to legal research,[88] whereby each piece of literature analysed offers an indication of further sources to review, most obviously by 'citation chaining' (following the sources cited by the commentators themselves). For all but the most ground-breaking work in the field, this will inevitably yield ample further research material, as each scholar stands on the shoulders of the giants before them. Of course, the danger here is of 'infinite regression':[89] part of the skill of any researcher, particularly in a field like law with little empirical research and widespread heavy reliance on cross-fertilisation of doctrinal, theoretical and comparative research, is to identify when 'enough is enough'. For the present thesis, that point came when a discrete set of sub-questions could be identified (see the end of Chapter 2) which was consistently unanswered or unsatisfactorily answered in the most cutting-edge contemporary scholarship.

It is also necessary to explain in some detail the choices made in respect of primary legal material (mostly reported judicial decisions). Part III explains the choice of using Irish legal material to discuss the value of participation, and European to discuss political independence. Bearing in mind what was said in the Methodology section about the use to which legal doctrine is put in this thesis, Ireland has been chosen as the primary source of doctrine for two main reasons. First, it is the jurisdiction with which the author is most familiar. As Green puts it, 'Law is a parochial business whose character and content depends on local institutions, events, and understandings.'[90] Irish legal material has also been most readily available to the author throughout the research project. Second, and more importantly from the perspective of the contribution this thesis makes to international scholarship on constitutional labour law, Ireland has relatively extensive and sophisticated (though by no means always meritorious, as will be argued in Chapters 7 and 8) jurisprudence on freedom of association, subsidiary regulatory institutions and fair procedures in the labour relationship. There is explicit acknowledgment that constitutional norms are often at stake in labour law cases, and the courts have consistently proven

[88] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 43, 52ff.
[89] Marnix Snel and Janaina de Moraes, *Doing A Systemic Literature Review in Legal Scholarship* (Eleven International Publishing 2018) 53.
[90] Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 565, 565.

themselves open to the horizontal application of human rights norms in a way that is unusual in Anglophone, common law jurisprudence.[91] Indeed, this in itself is chronically under-researched and warrants more scholarly attention than it is possible for this thesis to provide. That decisions of Irish courts are available in the English language makes Irish jurisprudence more accessible to international researchers. As a result, it is entirely appropriate to lean on Ireland as a significant source of relevant and useful doctrine to illuminate and illustrate the theoretical issues explored in this thesis.

That, of course, raises the inevitable question of why not rely on Ireland exclusively for doctrinal examples? First, Ireland is a small jurisdiction, and not every issue in constitutional labour law that we would like to see illustrated has arisen in the Superior Courts in Ireland. It is worth re-emphasising that doctrine is generally being used as 'real-life thought experiments' in this thesis. As such, there is no reason to be artificially limited in the use of examples by what happens to have occurred in one particular jurisdiction. Second, and relatedly, Irish case law on the sorts of 'civil liberties' issues examined in Chapter 10 is sorely lacking,[92] both generally and in particular in the context of employment disputes. There is some evidence of civil liberties issues arising in first-instance forums like the Workplace Relations Commission;[93] but it was decided not to rely on this material for the purposes of doctrinal analysis. There is little evidence of these filtering up to the superior courts.[94] Why this is the case is unclear, but it may have to do with the general under-exploration of the horizontal application of constitutional rights in certain fields compared to others.[95] Ireland is, of course, a small jurisdiction, and many issues of civil liberties in the workplace have only assumed legal prominence relatively recently, so it is unsurprising that we need to cast the jurisprudential net wider to find sufficient examples to draw on for this thesis.[96]

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[91] Alastair Richardson, 'Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights' (2018) 21 Trinity College Law Review 159; Michael Forde, 'Who Can Remedy Human Rights Abuses? The "State Action" Question' in KD Ewing, CA Gearty and BA Hepple, *Human Rights and Labour Law* (Mansell 1994) ch 9.

[92] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.07]; although interestingly, many of the most important freedom of expression cases involve picketing.

[93] For example, *McAteer v Tipperary County Council* EDA153 (Labour Court, 30 January 2015).

[94] With *Flynn v Power* [1985] IEHC 1 being an exception.

[95] See Gerard Hogan, 'The Farthest – December 1972' (2019) 62 Irish Jurist 1.

[96] The thesis does not make the argument for Irish courts to follow the decisions reached in other jurisdictions. As will be argued in Part III, the reasoning in many of these cases is disappointing and should not be followed in Ireland on similar facts. There are, of course, some lessons to learn; and Irish courts are bound to follow the rulings of the ECtHR and CJEU in cases that raise issues of the Convention and EU law respectively. But

Instead, the choice was made to pivot to European legal sources – specifically, the European Court of Human Rights (ECtHR). This will be explained further in Part III, but for the moment, suffice to say that not only does this court have a substantial body of relevant case law, but the trend appears to be gathering pace, as more constitutional labour law cases reach this court. As such, including them in the research for this thesis makes the research more relevant in contemporary international legal scholarship. Useful in this respect was the fact that the author has French language skills, including legal French, from his undergraduate studies, since some decisions of the ECtHR are only available in French, or at least not available in English. That leads us to the third reason for expanding the scope of enquiry beyond these shores: it is a theoretical project that claims relevance in respect of all liberal democratic polities, and as such should demonstrate its purchase in various legal orders. Across the West, many courts (and legislators) are grappling with the thorny issues of working-class representation and participation in economic and political life, and the aforementioned 'culture wars' as workplaces are increasingly politicised. There is a parallel but broader re-alignment of constitutional and political theory away from the neoliberal paradigm that (in the view of this author) has marginalised working-class people and their organisations in public life for the best part of half a century.[97] The choice of sources in this thesis reflects its effort to both transcend narrow doctrinal critique and develop a broader normative theory, but also to be practically useful in contributing to legal reform and political and academic discourse in Ireland, Europe and around the world. The final part of this chapter will sketch how the thesis will do that, by setting out the structure of the research and the arguments developed throughout the project.

Answering the central research question: argument and structure

This chapter so far has introduced the phenomenon of constitutional labour law as a description of observable trends in case law in a variety of jurisdictions, and in scholarship and public discourse, that requires explanation and justification. It has identified a central

the purpose of this thesis is to build a (doctrinally-informed) *theory* of how to resolve these sorts of issues in constitutional labour law. As demonstrated in earlier chapters, we need practical raw material – real-life thought experiments – to understand the dynamics of constitutional labour law: the issues that arise, the adjustments and balancing that need to be made, *etc*. If this cannot be found in one jurisdiction, then we need to broaden the horizon of scholarly inquiry. This thesis is a theoretical project: to that extent, it does not matter where the cases come from, so long as they help us better understand and illustrate the theory.

[97] Some elements of this research were presented at a conference which itself represented just such an attempt at re-alignment: The Dusts of Time? Towards a 21st-Century Constitutionalism conference (European University Institute, Florence, 8-9 Oct 2021).

research question capable of answer in a PhD thesis about this phenomenon, and proposed a method for pursuing an answer and sources to use in that pursuit. All that remains is to summarise the answer that will be given, and the structure by which that answer will be developed throughout the thesis.

Argument of thesis

This thesis offers a fresh account of extant trends in constitutional labour law, and a new theory of its normative foundations and potential future development. As signalled above, the theory proposed in this thesis is derived from an account of citizenship in a constitutional democracy, and places the role of a worker as a citizen at the centre of constitutional labour law. It will construct this model of citizenship from liberal, republican and socialist political theory, demonstrating that constitutional labour law is capable of enjoying support from across the academic and political spectrum. As will be explored in Part II (Chapters 3 to 5), this model of citizenship requires that workers be free from domination by management at work, and free to participate in both internal productive decision making and broader state politics without pressure or sanctions from their employers. Part III (Chapters 6 to 10) will analyse what this means in practice, through the themes of participation and political independence. The explanation of constitutional labour law in this thesis is based on a view of the constitutional project that has gone underappreciated in existing literature.[98] It will close the justification gap from both ends: constitutional theory and the philosophical foundations of labour law.

It will be argued that a key concern of constitutionalism, at least in the constitutional traditions which will be the focus of this thesis, is the building of citizenship. It is part of the project of constitutionalism that individuals in society relate to state officials as citizens rather than subjects, but also that individuals relate to one another as *concitoyens*.[99] Only thereby can the political culture required to sustain the constitutional order be maintained; democracy itself requires that individuals view each other first and foremost as citizens,

[98] No attempt will be made to justify, for example the horizontal application of human rights norms *generally*. The argument offered here *might* go some way to justifying horizontality in other contexts, but these implications will be beyond the scope of the thesis.

[99] Jeremy Waldron, 'Rights and majorities: Rousseau revisited' in *Liberal Rights* (Cambridge University Press 1993) ch 16. The use of the particular phrase '*concitoyens*' is the present author's, not Waldron's, but it is inspired by his reliance on Jean-Jacques Rousseau. It translates as 'co-citizens', the somewhat clunky nature of which more than justifies recourse to the French.

not bargaining partners, and certainly not as 'master and servant'. This project is undermined where institutional power structures characterised by a risk of domination (in the republican sense)[100] replace fraternal, public-spirited citizenship as the means by which individuals interact with one another in their private lives.

The labour relationship is characterised by open-ended institutionalised *authority* of one citizen over another.[101] The thesis will argue that it is a matter of constitutional concern that this authority be constrained by certain parameters, in order that the spirit of mutual citizenship be preserved in the relationship of worker and management.[102] That same spirit requires that authority must be *justified* in terms compatible with mutual citizenship, and considers that domination by one private individual over another is inimical to mutual citizenship.

However, this does not necessarily require that the private authority of the employer be subject to all the same constraints as the public authority of the State; merely such constraints as are necessary to maintain the relationship as being one between *concitoyens*. Likewise, it does not necessarily require the horizontal enforcement by constitutional courts of the gamut of socio-economic rights, and is not founded on material distribution. Certain rights should be protected in labour relations, but not for the sake of those rights *qua* rights, human, fundamental or otherwise – rather, to preserve the spirit of mutual citizenship in the labour relationship. Rights thereby function as 'defence mechanisms' for workers against the social power of employers, upon which they can interact with 'the boss' as one citizen to another, notwithstanding the institutional authority of one over the other.[103]

From the perspective of labour law, the thesis will argue that overcoming inequality of bargaining power to secure material improvements for workers ('bread and roses') has only

[100] David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6; Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014).
[101] Elizabeth Anderson, *Private Government* (Princeton University Press 2017).
[102] Philip Pettit, 'Legitimacy and justice in republican perspective' (2012) 65 Current Legal Problems 59.
[103] Philip Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576.

ever been part of labour law's story.[104] The other part is about *domination*:[105] even if labour law secured all the bread and roses a worker could possibly ask for, there is still a problem with being a well-fed slave.[106] My thesis will explain (and justify) constitutional labour law's apparent lack of concern with material benefits for workers on the basis that constitutional labour law is properly concerned with protecting citizenship by preventing domination in the labour relationship. Thus it plays an integral role in the cause of labour, which has always pursued respectful treatment and non-dominating authority within in the labour relationship,[107] *as well as* bread and roses. Workers are willing to accept authority, but only if it is justified and accountable.[108] This is because of the 'democratic intuition' that comes with being a citizen.[109] There is a long tradition in labour scholarship of concern with the emancipation of workers as *citizens*.[110] This thesis will argue that constitutional labour law can, and should, structure the power dynamics between worker and boss so as to protect the spirit of mutual citizenship (which is necessary for democracy to thrive)[111] from the risk of domination, thus advancing the constitutional project itself. This will require intervention in the labour relationship to protect (some) human rights (to some extent), as a way to ensure that the institutional authority which characterises that relationship is justified and legitimate, and compatible with the mutual citizenship of the parties to the relationship. The task of clarifying which rights, and to what extent, falls to Part III, as well as integrating this discussion of rights within a broader context that includes other constitutional norms like the delegation and separation of state powers. More on this structure follows.

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[104] Ken Coates, 'Wage slaves' in Robin Blackburn and Alexander Cockburn (eds) *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin 1967); Tony Topham, 'New types of bargaining' in the same volume.

[105] As captured by the memorable 'eyeball' test: see Philip Pettit, *On the People's Terms* (Cambridge University Press 2012) 299.

[106] David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6, 111; Ken Coates, 'Wage slaves' in Robin Blackburn and Alexander Cockburn (eds) *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin 1967) 74: 'A wage slave does not cease to be a wage slave when he can buy a refrigerator.'

[107] Ken Coates, 'Wage slaves' in Robin Blackburn and Alexander Cockburn (eds) *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin 1967) 82-85.

[108] Broadly aligning with the 'tough luck' test: see Philip Pettit, *On the People's Terms* (Cambridge University Press 2012) 177.

[109] See Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 60.

[110] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014); see also Sidney and Beatrice Webb, *Industrial Democracy* (2nd edn, Longmans, Green 1920).

[111] Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press 2010).

Structure of thesis

1. *Part I*

We are approaching the end of Chapter 1. Chapter 2 will complete the first Part of this thesis, the purpose of which is to set out the scope of inquiry and posit questions that need resolution. To this end, Chapter 2 will examine existing literature on constitutional labour law, identifying two broad categories of scholarship: 'labour rights are human rights' and 'human rights at work'. These constitute paradigms through which the phenomenon of constitutional labour law is studied and justified. Chapter 2 will call attention to flaws in both paradigms which mean they leave important questions unanswered, creating the justificatory gap referred to earlier in this chapter. This will set the stage for the three chapters to follow, which posit an alternative theory that is both more descriptively accurate and more normatively salient, based upon the contribution constitutional labour law makes to the promotion and protection of citizenship in a constitutional democracy.

2. *Part II*

Chapter 3 will discuss the established normative justifications for labour law, arguing that these various strands should best be viewed as a form of progression. The lesson will be drawn from existing labour scholarship, both recent and historical, that a central concern of labour law is, and always has been, to allow workers to participate as full, equal citizens in a constitutional democracy.

Chapters 4 and 5 develop a theory to justify constitutional labour law, based around the need to protect workers as citizens within a constitutional democracy, to close the justificatory gap from Chapter 2. Together they argue that citizenship, properly understood, justifies intervention by constitutional courts in the labour relationship on the basis of constitutional norms – *ie*, justifies constitutional labour law. These chapters will clarify the relationship between citizenship status and constitutional labour law, examining the threats posed by the labour relationship to workers' ability to function as citizens, and the need to place constraints on employer authority within a constitutional settlement.

3. *Part III*

The thesis to this point will have identified two thematic values underlying the concept of citizenship in the context of labour relations: participation and political independence. Chapter 6 focuses on the complementarity between industrial and political democracy, which manifests as a detailed examination of how participation in workplace governance both supports and is mandated by citizenship of a constitutional democracy. Constitutional labour law should situate the employment relationship within a 'democratized economy… governed by capital and labour acting together in furtherance of the public good.'[112] The participation of workers, employers and their respective organisations in decision-making gives such decision-making machinery constitutional legitimacy within the state.[113] Such participation will help workers develop political skills that transfer over to the public realm. In this way, the 'labour constitution' complements the 'political constitution' that facilitates participation by citizens and their representatives in political processes.[114]

From the insights in Chapter 6 about the importance of worker participation in decision-making, we derive three specific manifestations of participation in constitutional labour law: labour representative organisations, fair procedures in disciplinary proceedings, and subsidiary regulatory institutions. Chapter 7 will use Irish constitutional jurisprudence to illustrate practical issues in respect of the first two elements, those within the workplace. Chapter 8 uses Irish jurisprudence to examine the third element, institutions in which workers' and employers' organisations participate in producing regulation for their sector of the economy.

Chapter 9 begins to bridge the gap between 'labour rights' and 'civil liberties' in the context of constitutional labour law. It will argue for rights of workers against employers to freedom of expression, the free practice of religion or philosophical belief, and privacy, in order to protect workers' political independence. Chapter 10 will use European case law to illustrate the sorts of civil liberties issues that crop up in constitutional labour law, and offer a reasoned basis for the relevance of these rights to the citizenship project at the heart of this thesis.

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[112] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 4.
[113] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 13ff.
[114] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 18.

Chapter 11 will conclude the argument set out in this thesis, drawing together the contributions of the various chapters to answering the central research questions posited in this chapter, and rendered more specific by the survey of existing literature in Chapter 2. It will also suggest a future research agenda that could build on the present thesis.

CHAPTER 2:
CONSTITUTIONAL LABOUR LAW IN EXISTING SCHOLARSHIP

Introduction

Chapter 1 set out the central research questions at the heart of this thesis: why, and how, should courts intervene in the labour relationship on the basis of constitutional norms? What is the theory of constitutional labour law that courts should follow? It defined the scope of the inquiry, identifying the phenomenon of constitutional labour law as our area of concern. As set out in Chapter 1, this consists of the decisions of constitutional courts in matters of the labour relationship, by reference to constitutional norms – in particular human rights. Obviously, some of what follows in this chapter (and others) will be jurisdictionally-contingent, but that does not render otiose an assessment of theoretical perspectives on the practice of constitutional labour law as it has emerged across various jurisdictions. The thesis aims to justify, as a matter of normative political theory, courts' reliance on constitutional norms in governing the labour relationship.

This chapter assesses the position of constitutional labour law within existing literature in the field, which suggests a connection between labour law and human rights that appears useful for the justificatory project of this thesis. Of course, as stated in Chapter 1, constitutional labour law is not exhausted by individual rights, be these characterised as 'constitutional', 'fundamental' or 'human'. However, as will become clear throughout this chapter, it is questions about the enforcement of such rights that have come to dominate the literature in this field. The authors whose work is surveyed here do not use the term 'constitutional labour law', but they approach the same phenomenon as this thesis.

This chapter will examine the two prevailing ways of conceiving of the relationship between human rights and labour law: 'labour rights are human rights' and 'human rights at work'. Each has an impressive body of scholarship behind it, but ultimately the chapter will conclude that neither adequately justifies constitutional labour law in practice. It will be demonstrated here that each account manages to both demand too much, and explain too little, of constitutional labour law as it has developed in practice. They leave an explanatory and justificatory gap, which later chapters of this thesis fill with a normative ideal of

citizenship. Reviewing this literature is necessary to identify the issues our theory must account for.

I. Labour rights are human rights

The attempt in modern academic literature to examine the relationship between human rights and labour law began around the turn of the millennium. In the UK, the Human Rights Act 1998 was initially thought to hold great promise for labour law.[1] Across Europe and the wider West, the fall of the Soviet Union and integration of former Soviet states into the European Union appeared to demand some kind of reconciliation of pro-worker ideology with the now-entrenched liberal international order.[2] Gross wrote about the 'long overdue beginning' of an alignment between 'workers' rights [and] human rights'.[3] However, progress was slow: Alston decried the 'not so happy state of the art'[4] and from the beginning there was widespread concern that conceiving of labour rights as human rights would have deleterious consequences for workers and for the discipline of labour law.

Here is not the place for a full examination of the debate about whether labour rights are, or should be, human rights. It will become clear fairly quickly that 'labour rights are human rights' is inadequate to explain constitutional labour law as it has been defined for the purposes of this thesis. However, some discussion of the nature of the claim that 'labour rights are human rights' is necessary to understand the next section, on the 'human rights at work' paradigm, and set the stage for the new theory this thesis exposits. The remainder of this section will examine the distinction between the instrumental value of the claim and

[1] John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001); Robin Allen, Rachel Crasnow, Anna Beale, Claire McCann and Rachel Barrett, *Employment Law and Human Rights* (3rd edn, Oxford University Press 2018) 7-14. Not all commentators agreed: see, for example, KW Wedderburn, 'Freedom of association or right to organise?' (1987) 18(4) Industrial Relations Journal 244; KD Ewing, 'The Human Rights Act and Labour Law' (1998) 27(4) Industrial Law Journal 275, and 'Human Rights, Social Democracy and Constitutional Reform' in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (Mansell Publishing 1996) ch 3. For how academic opinion evolved alongside ECtHR jurisprudence in the labour law field, see Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41(2) New Zealand Journal of Employment Relations 3.

[2] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

[3] James A Gross, 'A Long Overdue Beginning' in James A Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2003) ch 1.

[4] Philip Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press 2005) ch 1.

its conceptual truth, then highlight its deficiencies in explaining constitutional labour law in practice and theory.

Instrumental value: political slogan

'Labour rights are human rights' has become a staple slogan of modern industrial and political action. It certainly sounds appealing. In an era of ascendant 'rights-discourse', it might be very useful politically if workers could convincingly claim that labour rights were human rights.[5] Human rights have a certain normative heft that seems to transcend self-interested bargaining over pay and conditions. Calling something a 'human right' makes it seem more important.

The effectiveness of rights-discourse in politics is beyond the scope of this thesis, but a number of claims can plausibly be made about the rhetorical advantages of calling labour rights human rights.[6] First, there is the added normative force inherent in the language of human rights. Invoking human rights directly in negotiations or disputes with employers may have benefits for workers if such rhetoric holds additional persuasive power. Second, human rights appeal to a broader audience: framing the demands of workers as a human rights claim could be crucial in rallying political or popular support behind them.[7] This could be particularly useful for organising a consumer boycott of businesses that do not pay decent wages, for example, or appealing to political actors to intervene in a labour dispute. Human rights also act as an 'ethical *lingua franca*',[8] which allow their appeal to transcend borders and gain support among the international community.

It should be noted, however, there is a risk that hand can be over-played. Relying too heavily on human rights to justify legal entitlements risks limiting the kinds of demands workers can make against their employer – for example, it will be difficult for a worker to

[5] Hugh Collins, *Employment Law* (Oxford University Press 2010) ch 10; for a general discussion of the power of 'rights-talk' rhetoric, see Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Janet Brown and Wendy Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) ch 6.
[6] See further Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41(2) New Zealand Journal of Employment Relations 3; Judy Fudge 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 Dalhousie Law Journal 601; Kevin Kolben 'Labour Rights as Human Rights?' (2009) 50 Virginia Journal of International Law 449.
[7] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[8] John Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press 2007) 75.

bargain for a ten o'clock start time, a particular redundancy payment or wearing a nose-piercing if he is limited to arguing for them in terms of human rights. Conversely, if every demand a worker makes in negotiating his contract of employment *is* couched in terms of rights, that may debase rights-discourse, and drain the normative force from arguments that legitimately relate to human rights issues – nobody should risk becoming 'the worker who cried human rights'.[9]

Ultimately this is a strategic issue – when to deploy political rhetoric for maximum effect. As will be discussed later, there are further strategic considerations at play in the 'labour rights are human rights' paradigm. These latter concerns are relevant even if 'labour rights are human rights' is more than political sloganeering: if there is some genuine conceptual truth to the claim. Obviously, a political slogan will always be more rhetorically effective if it is at least conceptually plausible, but 'labour rights are human rights' might just be an example of the kind of 'truthiness'[10] that succeeds in political discourse but is unsuitable for academic scholarship. Any lawyer in the fields of property or tax law can debunk the claim that 'taxation is theft', but that does not prevent it being rhetorically effective and, therefore, politically useful. For the purposes of this thesis, we must examine the conceptual truth of the claim 'labour rights are human rights' to assess whether it adequately explains the doctrine of constitutional labour law; that is more important than its rhetorical effect.

Conceptual claim

What are labour rights?

First, the concept of 'labour rights' requires some examination. It is straightforward enough to see what labour *law* is – the set of legal rules that is concerned specifically with working and the workplace. Even if a precise definition is difficult to provide, 'work', 'labour' or 'employment' is clearly a discrete subject matter, with a corresponding relatively distinct area of law.[11] A labour *right*, on the other hand, is less obvious. There are lots of legal

[9] See discussion in Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 40-42.
[10] Stephen Colbert, 'The Colbert Report: The Word – Truthiness' *Comedy Central* (New York, 17 October 2005).
[11] KW Wedderburn, *Employment Rights in Britain and Europe* (Lawrence & Wishart 1991), and *The Worker and the Law* (3rd edn, Sweet & Maxwell 1986).

provisions that give individual workers a 'right' that will never plausibly qualify as a 'human' right. For example, workers in Ireland have a 'right' to receive a written contract of employment within a month of starting their job.[12] If our definition of 'labour rights' includes *all* legal rights of workers, then the claim that labour rights are human rights cannot be true.[13] If the claim is implicitly *some* labour rights are human rights, we are left wondering *which*, and how to decide.

Gilabert defines labour rights as 'rights that human beings have in their capacity as workers'.[14] This definition has two elements: first, there is something about the *human condition* that is relevant to deciding which labour laws qualify as 'labour rights'. Second, 'labour' does not merely indicate the context in which these rights happen to arise, but rather they can *only* arise in the context of work, because they are by nature work-related. Likewise, Mantouvalou offers 'entitlements that relate specifically to the role of being a worker'.[15] This also suggests that there is something about a labour *right* that is more important than a substantive labour *law* – that labour law regimes may reasonably differ from one another in matters of detail, provided they satisfy certain minimum 'entitlements'.[16]

Support for this understanding of labour rights can be drawn from the International Labour Organisation, whose Declaration on Fundamental Principles and Rights at Work identifies the following 'core labour standards':

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour;

[12] Terms of Employment (Information) Act 1994, section 3.
[13] Notwithstanding that some commentators argue that all labour law can be *derived* from human rights – see below.
[14] Pablo Gilabert, 'Labor Human Rights and Human Dignity' (2016) 42(2) Philosophy and Social Criticism 171.
[15] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 152.
[16] Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 38-40, and 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 42-44. For more on the relationship between rights and the political legitimacy of law, see Dan Priel, 'Making Sense of Nonsense Jurisprudence' (2020) <https://ssrn.com/abstract=3696933> accessed 19 November 2020.

(d) the elimination of discrimination in respect of employment and occupation;[17] and

(e) a safe and healthy working environment.[18]

This list is helpful, but probably incomplete. It is far from clear on what normative basis those five elements have been selected for special attention.[19] The very idea of work, at least in a capitalist economy, seems to establish a dichotomy (however loose) between people who have jobs (whether they are employed or self-employed) and those who are unemployed, doing unpaid work (including in the home) or otherwise 'economically inactive'. In a capitalist economy, this distinction is likely to be a socially-salient one, with very important consequences for people's standard of living and social conditions. Labour rights presumably have something to say about the circumstances under which one can pass from one category to the other: that one not be forced to work, but have the freedom to work if one so chooses, and not be dismissed unfairly. They must also speak to the issue of for *whom* the distinction ought to be salient: for example, the position of children in the labour market. Next, while there is of course heated debate over whether labour protections should be extended to unpaid (particularly care and domestic) work, it is easy enough to see that issues of hiring, pay and conditions are inherently work-related. Finally, although it is certainly possibly to envisage a developed industrial economy without collective representation of workers,[20] the historical development of modern economies and modern labour law, as it actually occurred, cannot be recounted without an awareness of trade unionism, collective bargaining, and strikes.[21]

Thus, Gilabert draws three broad categories of labour rights: the right to work and access to employment; pay and conditions of work; and freedom of association and collective

[17] ILO Declaration on Fundamental Principles and Rights at Work, article 2.

[18] Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work (International Labour Conference, 110th session, 2022).

[19] Of course, it is possible that there is no normative basis, and this was just the list that emerged from tripartite negotiations at the ILO. Moreover, the selection of 'core standards' from amongst the various demands of the labour movement and requirements of international labour law is not uncontroversial: see Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) European Journal of International Law 457. This was the subject of a strident reply in defence of the 'core standards' approach: Brian Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16(3) European Journal of International Law 409.

[20] It might be observed that some advanced economies are perilously close to this condition already: see Harry Arthurs, 'Labour Law After Labour' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1; Alan Hyde, 'The Idea of the Idea of Labour Law' in the same volume, ch 6.

[21] At least in the West: China and some Middle Eastern states might have industrialised without trade unionism as we think about it in the West.

bargaining and action.[22] Again, of course, these must be considered at a certain degree of abstraction: the right to receive a copy of one's contract within a month surely relates to the 'conditions of work', but is still not a 'labour right' (although it might be *derived* from an underlying labour right to, say, decent conditions).[23] Having identified at least the most obvious labour rights, it remains to consider what it means for these to 'count' as human rights. There are two ways to go about this: first, a positivist approach, which checks whether these labour rights are typically found alongside other human rights in constitutions, treaties, charters and other instruments; second, a normative approach, which assesses whether these rights meet some defined philosophical standard for delineating human rights.[24]

Positivist account of human rights

Human rights instruments generally do include labour-related rights as a matter of course.[25] The Universal Declaration of Human Rights prohibits slavery[26] and discrimination,[27] and protects the rights to work, decent pay and conditions, equal pay for equal work, freedom of association,[28] and adequate leisure time.[29] Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights elaborate further on these, and add the right to strike.[30] Labour rights feature prominently in the European Social Charter and the Charter of Fundamental Rights and Freedoms of the European Union. Even the European Convention on Human Rights, which is primarily concerned with civil and political rights, has been interpreted to provide protection to the right to work,[31] and many aspects of collective action.[32]

[22] Pablo Gilabert, 'Labor Human Rights and Human Dignity' (2016) 42(2) Philosophy and Social Criticism 171.
[23] Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 40-42, and 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 44.
[24] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[25] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 152-53.
[26] Article 4 UDHR.
[27] Article 7 UDHR.
[28] All Article 23 UDHR.
[29] Article 24 UDHR.
[30] Article 8(d) ICESCR.
[31] For example, *Sidabras and Džiautas v Lithuania* Applications nos 55480/00 and 59330/00.
[32] For example, *Wilson and others v United Kingdom* Applications nos 30668/96, 30671/96 and 30678/96.

This list could go on: as Mantouvalou says, labour rights are clearly human rights as a matter of positive law.[33] However, this approach is unsatisfactory. As Mantouvalou points out, different human rights instruments contain different lists of labour rights, with no obvious way of deciding which is authoritative: most comprehensive, most widely-adopted, most recent, most stringently-enforced?[34] She also argues that, as products of international negotiation and compromise (and often tainted by Cold War ideological power games),[35] human rights instruments rarely reflect considered philosophical debate on the nature and content of rights.[36] We still need a way to decide whether, and which, labour rights *belong* on the lists contained in human rights instruments. Only a normative account of human rights can provide this.[37]

Normative account of human rights

It is far beyond the scope of this thesis to generate a theory of human rights from first principles. To call this a philosophical minefield would be an understatement.[38] Thankfully, recent scholarship has laid much of the groundwork in setting out a model of human rights that is sufficiently sensitive to the question of whether labour rights qualify as such.[39]

[33] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 153.
[34] This uncertainty might even call into question whether labour rights – or indeed human rights for that matter – are truly universal. Only normative theory can make that case. Of course, neither labour rights nor human rights need necessarily be universal to justify constitutional labour law within particular jurisdictions; but again that is a question only some normative theory can answer.
[35] See also Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[36] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 155.
[37] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 140-41.
[38] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 141. For scepticism of human rights theory, see Edward E Potter in James A Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2003) ch 5.
[39] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020); Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9; Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022).

To briefly recount the sorts of arguments made by Atkinson,[40] Mantouvalou,[41] Collins[42] and others, a human right arises when an important interest of a human being justifies holding someone else under a duty.[43] Human rights instruments are in general agreement on which kinds of interests are important enough to impose duties on governments and, in some cases, other individuals: life, not being tortured, privacy, family, freedom of expression, free practice of religion, *etc*. Many also include *material* interests, sometimes referred to as 'socio-economic rights', such as healthcare and education. If labour rights are appropriate to be called human rights, it is likely that most of them will be of this latter kind.

Dworkin argues that rights are 'trumps' over considerations of policy or the public interest;[44] Waldron says they are 'limits on the harms or losses that any individual or group may reasonably be expected to put up with [and] will not be traded off against a larger mass of lesser considerations in the way the utilitarian calculus allows'.[45] This view presupposes it is likely that the person or institution against whom those rights exist will seek to infringe rights to pursue some other goal. This goal can be noble or nefarious: for example, the state might confiscate property to pay for public healthcare, or suppress political speech and imprison critics to prop up the regime. Human rights mark off which interests of individuals cannot be sacrificed to pursue such goals, or at least which place a special burden to justify their infringement in terms of a legitimate aim and proportionality.

Clearly, labour rights protect important material interests of workers. Working allows people to earn money to pay for their material needs. Work is valuable for other reasons than earning a living: as the ECtHR pointed out in *Sidabras and Džiautas v Lithuania*[46] and *Campagnano v Italy*,[47] work is where many people socialise and form relationships with others. Moreover, the Irish Supreme Court held in *NVH v Minister for Justice*[48] that

[40] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020).
[41] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[42] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9.
[43] Joseph Raz, 'The Nature of Rights' in *The Morality of Freedom* (Clarendon Press 1986) ch 7.
[44] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[45] Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1993) ch 16.
[46] Application no 55480/00.
[47] Application no 77955/01.
[48] [2017] IESC 35.

working (particularly for recent immigrants or other marginalised groups) is also part of participating in mainstream society. Of course, a right to work only makes sense as a means to provide for material needs where the work attracts a decent wage, under decent conditions.[49] Income is not the only material interest at stake in the workplace: labour rights also protect leisure and rest time, as well as safe working conditions. It is important to note that the right to leisure is not simply the flip side of the right to work, like how the right to not express oneself is part of the right to freedom of expression. These rights protect *separate* interests: 'hearts starve as well as bodies'.[50] Even if it is hard to see the specific individual interest that is inherent in the rights to freedom of association and collective bargaining, they might be instrumental to the other substantive rights discussed above – a way to avoid 'collective begging' for higher wages.[51] However, this does not preclude their recognition as human rights: they serve the same role as Art 13 ECHR or Art 47 EU Charter, guaranteeing an effective means of securing the other rights. Humans have a distinct interest in knowing that there is something they can do to secure their other interests.

As pointed out above, the fact that these interests only arise in certain circumstances (*ie* one has a job) is not fatal to their recognition as human rights:[52] after all, the right to family life only arises if one has a family, the right to a fair trial only if one is engaged in a legal dispute, and the right to property only applies if one happens to own some property.[53] The point of calling something a human right is that *whenever* a person finds himself in those circumstances, the right is engaged.[54]

Whether labour rights can act as 'trumps' over other interests is a functional question – whether labour rights can play the same kind of role that other human rights do. The existence of a right presupposes the person or institution against whom the right exists will likely seek to trade off the interest it protects to pursue some other goal. Although the state might, for example, suppress trade union activity in the interests of public order,[55] it is more

[49] Hugh Collins, 'Is There a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosphical Perspectives* (Hart Publishing 2014) ch 8.
[50] James Oppenheim, 'Bread and Roses' (1911).
[51] KW Wedderburn, *The Worker and the Law* (3rd edn, Sweet & Maxwell 1986). They may also protect inherent values in socialisation and expression – this will be discussed further in Chapter 6.
[52] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2013) ch 14.
[53] *Cf* Jeremy Waldron, 'Homelessness and the issue of freedom' in *Liberal Rights* (Cambridge University Press 1995) ch 13.
[54] *Cf* Christopher McCrudden, *Litigating Religions* (Oxford University Press 2018) 128ff.
[55] See, for example, *Demir and Baykara v Turkey* Application no 34503/97.

likely that an *employer* would be inclined to trade off labour rights in the pursuit of profit. An employer is ultimately interested in keeping costs down and making his employees more 'productive'. As demonstrated above, the labour rights found in human rights documents are concerned with traditional 'bread and roses' interests: wages, working hours and rest periods, holidays, pensions, safe working conditions, *etc*. All of these can be considered oppositional to the employer's interest in profit, and capable of acting as 'trumps' over this goal (whether or not we think it is appropriate to enforce them against private individuals in this way, as will be discussed later).

It should be noted, first, that labour rights of the kind discussed above do not qualify under many theories of human rights. Collins, drawing on Rawls, says that human rights must be compelling, universal, stringent and timeless, and argues that labour rights rarely meet these criteria because (a) they are less important than things like avoiding torture, and (b) they evolve alongside changes in the methods of production and the level of economic development in any given society.[56] He concludes that the 'rhetorical' use of human rights in the context of labour law can only be in 'bad faith' (but might nonetheless be useful).[57] McCrudden points out that Griffin's prominent dignitarian conception of human rights explicitly rejected most core labour rights.[58] Although the 'popular view of dignity' as it has emerged in human rights legal practice might lead 'litigants [to] feel that human rights courts would… embrace labour rights as human rights', human rights norms are only really likely to assist workers *in extremis*.[59]

Some defenders of the 'labour rights as human rights' thesis have met these objections on their own terms. Mantouvalou argues that Collins is wrong to say labour rights do not meet the four criteria he establishes.[60] Many labour rights *are* compelling, universal, stringent

[56] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9.
[57] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 144. See also Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 15.
[58] Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, *The Autonomy of Labour Law* (Hart Publishing 2015) ch 11, 280.
[59] Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, *The Autonomy of Labour Law* (Hart Publishing 2015) ch 11, 287-88.
[60] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 164ff.

and timeless – or at least as much so as other, more canonical human rights. This is particularly so if one takes a 'progressive realisation' approach to the vindication of labour rights, which is a common standard of review for economic, social and cultural rights in human rights legal practice.[61] Atkinson assesses four leading theories of human rights, those of Rawls, Raz, Griffin and Tasioulas, and concludes that while none of these theorists actually considered labour rights to be human rights, one can extrapolate to some labour rights from the frameworks of Raz, Griffin and Tasioulas.[62] Although '[m]uch more work is needed' to adequately defend the entirety of labour *law* in terms of human rights, a core set of labour rights can be considered human rights. Elsewhere, Atkinson argues from a foundation of human rights to a set of labour rights, that justifies most of modern labour law.[63] He considers that a 'modified interest-based theory' of human rights, which holds that human rights are 'moral rights, grounded in universal basic interests, that make up conditions for a minimally decent human life', is capable of justifying labour law in general.[64] Although adamant that he is discussing human rights in a moral, normative, theoretical sense, 'legal protections and frameworks will often be required to fully implement' these moral rights.[65] This distinction is of course relevant to the question of whether 'labour rights are human rights' explains or justifies constitutional labour law; it will be explored below.

Explanatory power of 'labour rights are human rights'

Remember that the task of this thesis is not to assess the merits of conceiving of labour rights as human rights on its own terms, be these practical or normative.[66] But it is worth referring to this debate, because it will suggest aspects of constitutional labour law that our theory must explain. A number of commentators argue that human rights theory and legal

[61] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 166.
[62] Joe Atkinson, 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7.
[63] In fact, he makes a stronger claim that it was labour law that inspired modern human rights law: the ILO existed before the UDHR, and had been using the language of rights for a long time; see Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 68-69.
[64] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 182.
[65] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 182.
[66] A strategic question as to the merits of a human rights approach to labour law, going beyond the question of the strategic use of human rights *rhetoric* we saw earlier.

practice are (a) too individualistic, posing a danger to worker solidarity; and (b) place too much trust in courts (and judges) which have not historically been comrades of the labour movement.[67] These criticisms will be considered again below, in light of the 'human rights at work' approach, since they apply with all the more force to that paradigm.

Our task is to assess whether a theory of constitutional labour law based on 'labour rights are human rights' is capable of explaining and justifying constitutional labour law as we see it in practice. This thesis does not demur from Atkinson's conclusions that a suitable theory of human rights is capable of normatively justifying a great deal of extant labour law, as one 'foundation' of the discipline among many.[68] It also agrees with the bulk of literature on this topic that there are potentially great instrumental benefits to treating labour rights as human rights.[69] However, 'labour rights as human rights' ultimately fails to explain and justify constitutional labour law on both a normative and a descriptive level. This 'justificatory gap' requires a new theory to fill it.

Normative failures

These should be considered briefly, because they are of limited relevance to the theoretical foundations of constitutional labour law. It may well be established (albeit in the face of noteworthy opposition) that labour rights qualify as human rights in a normative sense (whether according to some well-established theory of human rights, or a new one we develop ourselves for this purpose). But we have already seen that positive human rights law and practice is not the same as a human rights theory; indeed, Atkinson actively

[67] KW Wedderburn, *The Worker and the Law* (3rd edn, Sweet & Maxwell 1986).
[68] For more on the 'pluralistic' foundations of labour law, see Chapter 3.
[69] The balance of the literature on labour law and human rights concludes that a human rights strategy can be of substantial benefit to workers, both individually and collectively: see Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work* (Hart Publishing 2010); Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022), and 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 182. Three benefits are typically offered: the political advantages of human rights rhetoric (considered above); normative and institutional. The normative benefits arise from the premise that human rights apply to all persons, everywhere in the world. They are thus universal in two ways that labour law traditionally is not: (a) the personal scope of human rights within any given legal system extends to all human beings, rather than merely 'employees'; (b) human rights are taken to apply within all legal systems, rather than being idiosyncratically available on the basis of legislative policy within a given state. Meanwhile, in developed liberal democracies at least, human rights norms typically come with relatively sophisticated enforcement mechanisms: many countries have a constitutional court or a supreme court with jurisdiction to apply constitutional human rights. There are also international enforcement mechanisms for human rights, such as the ECtHR and the UN.

embraces this distinction.[70] Not all human rights *theory* makes it into human rights *law*.[71] Therefore, we need some additional theory to tell us *which* 'moral human rights' need protection by means of 'legal human rights' (enforced by constitutional or international human rights litigation), why these rights and not others, and whether labour rights are included among them. In particular for present purposes, we need additional theory to explain why it is appropriate that there be constitutional norms protecting labour rights from interferences by private employers.

As set out above, theories of human rights tend to derive rights from important individual interests.[72] In this context, we face the rejoinder that it is not immediately obvious why employers, as private individuals with their own interests to pursue, need to concern themselves with the interests (and therefore the rights that protect them) of their workers.[73] The state may well be obliged to take special care not to interfere with these interests, but the same may not be true of employers. Indeed, since employers are seeking to make as great a profit as possible, and most of the labour rights identified above (especially decent wages, safe conditions, and leisure for workers) will cost the employers more money, employers can only have regard to workers' interests by compromising on their own.[74]

An enlightened employer may well see some benefit to himself of protecting his workers' labour rights. Obviously, 'employers cannot carry on industry nor accumulate profits if they have not got the good will of the workers or their acquiescence in carrying on such industry'.[75] The benefits to employers of a happy, healthy workforce are, however, contingent. We need a justification for courts to force employers to respect rights when it is not obviously in their interest to do so. There are some public interest benefits: for example, industrial action can be disruptive to consumers. When workers are inadequately paid or exposed to risk of injury, the state will end up having to foot the bill for

[70] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 227ff.
[71] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 227, 229.
[72] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 125 demurs, arguing the horizontal application of rights in particular should not be based on the interests of individuals; this will be returned to in Chapter 5.
[73] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 57ff.
[74] See further Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 4-5, 11, 17, 68, 111-13, 125ff, 165-66, 172ff.
[75] James Larkin, *The Irish Worker* (26 April 1913).

supplementary welfare benefits, public housing, healthcare, *etc*. Nor is it too alarmist to note that 'conditions of labour [may] exist involving such injustice, hardship and privation to large numbers of people as to product unrest so great that the peace and harmony of the world are imperilled':[76] look at the social conditions that bred Bolshevism, fascism, Nazism and Maoism, as well as more recent political upheavals.[77]

However, this only establishes that moral human rights exist against employers;[78] but does not in itself justify constitutional labour law, because not all human rights theory becomes human rights law. Atkinson addresses this more specifically in arguing that (a) employers have incentives to disregard human rights,[79] arising out of the legal protection for property and the corporate form, and (b) a state fails in its human rights duties if its legal system incentivises or empowers private actors to interfere with human rights.[80] This latter we could consider a form of 'outsourcing tyranny'.[81] But he concedes that these human rights

[76] Preamble to the Constitution of the ILO.

[77] William A Pelz, *A People's History of Modern Europe* (Pluto Press 2016) chs 8-13; see also Alan Bogg and Mark Freedland, 'Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement' (2018) MPIL Research Paper Series, no 2018-15. Of course, many states perceive an economic interest in promoting as 'flexible' a labour market at possible, without protection for labour rights. A significant contribution to China's rapid economic development has been Western companies outsourcing manufacturing to low-cost destinations: see Novella Bottini, Christoph Ernst and Malte Luebker, 'Offshoring and the labour market: What are the issues?' (2011) ILO Economic and Labour Market Paper 2007/11 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---analysis/documents/publication/wcms_113922.pdf> 5 accessed 22 June 2022. Even within the constitutional traditions studied in this thesis, there is an ongoing tension between 'old' member states of the EU with traditionally high wages and robust labour rights, and the post-2004 member states whose low-cost workforce offers them a competitive advantage – as highlighted by the somewhat divergent reaction to the decisions of the CJEU in C-438/05 *Viking Line* and C-341/05 *Laval*: see further Mark Freedland and Jeremias Adams-Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2016). Later chapters will nevertheless defend horizontally-enforceable constitutional labour law as being in the interest of the state, at lease any state that holds itself out as a constitutional democracy.

[78] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 238ff; see also Keith Ewing, 'Human Rights in the Workplace' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).

[79] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 244, 249; Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504; Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Virginia Mantouvalou and Gillian Lester (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3.

[80] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 247; John Gardner, 'What Is Tort Law for? Part 2: The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) ch 16.

[81] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 18, 26, 37, 68, 165-67, 175.

duties can be discharged by means of ordinary labour law.[82] He offers no reason why it is particularly appropriate for labour rights to be protected by *constitutional* norms.

Descriptive failures

All of this is to say that 'labour rights are human rights' on its own is unable to explain constitutional labour law on a normative level. However, the picture is even worse at a descriptive level. 'Labour rights are human rights' fails in two respects to convincingly describe the existing doctrine of constitutional labour law: first, it demands too much, and second, it explains too little.

We saw above that 'labour rights' include many rights we would traditionally call 'socio-economic rights': most notably decent pay and physical conditions of work, and adequate rest and leisure. On both positivist and conceptual accounts, these qualify as human rights. Article 23 UDHR protects the rights to 'just and favourable conditions of work' and 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity'; Article 3 ESC[83] protects the right to 'safe and healthy working conditions'; Article 7 ICESCR[84] protects the right to 'rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'; *etc*. Both Mantouvalou[85] and Atkinson[86] argue convincingly that, whether we start with existing human rights theories or develop a new one from first principles, these rights should be protected on a normative view. However, there is scant evidence that courts are enforcing these rights by means of constitutional labour law. That is not to say these rights go unprotected: most modern states have some legal regulation of pay, conditions, and working time. But these are not considered nor treated as *constitutional* norms.

[82] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 229.
[83] European Social Charter,
[84] International Covenant of Economic, Social and Cultural Rights.
[85] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[86] Joe Atkinson, 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7, 128-29, 133, 135-36; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 253ff.

There are any number of theories as to why it is inappropriate for constitutional courts to enforce so-called socio-economic rights[87] (and any number explaining why they should),[88] but the existence of this parallel debate only bolsters the case that 'labour rights are human rights' cannot explain constitutional labour law as it actually occurs. Inevitably the claim must be weakened to either '*some* labour rights are human rights' or 'labour rights are *sometimes* (treated like) human rights'. For more information on the 'some' and the 'sometimes', we need a theory of the constitutional structure charged with enforcing them, and the legitimacy of certain kinds of legal actions. In any event, if constitutional labour law does not protect all labour rights, then labour lawyers might be left wondering what the point of it is. All of this will be returned to in the discussion of 'human rights at work', which gets closer to an answer – but ultimately falls short.

The larger problem for the 'labour rights are human rights' model is that it fails to explain much of what the courts actually are doing in the field of constitutional labour law. We saw above that labour rights are about (a) access to and security of employment, (b) material conditions, and (c) collective action by and representation of workers. As just noted, constitutional labour law has very little to say about material conditions. It does deal with access to employment to the extent that, in some jurisdictions, there is a (very limited) right to work,[89] and discrimination on various grounds in access to employment is broadly prohibited in liberal Western democracies. Representation of workers and other freedom of association issues are addressed in constitutional labour law (as will be seen in Chapters 7 and 8), but hardly in a way that vindicates Gross' claim that '[f]ew human rights are more important than the right of freedom of association'.[90]

Rather, pride of place in constitutional labour law is occupied by what we might call 'civil liberties' – freedom of expression, privacy, free practice of religion, *etc*. Although labour lawyers broadly recognise these as important and valuable to workers, on no plausible account do they qualify as 'labour rights'. Recall that Gilabert and Mantouvalou both

[87] See, for example, Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge University Press 2019); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[88] See, for example, Jeff King, *Judging Social Rights* (Cambridge University Press 2012).
[89] See, for example, *NVH v Minister for Justice* [2017] IESC 35; *cf* the various contributions to Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2014).
[90] James A Gross, 'A Long Overdue Beginning' in James A Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2003) ch 1, 1.

stressed that labour rights must relate in some way to the institution of working and the dynamics of the productive process. The mere fact that a *worker* might claim a particular right against his *employer* cannot be enough to transform that right into a labour right. Moreover, it is hard to see what ties together representation, participation and civil liberties (and distinguishes them from other kinds of human rights) under the 'labour rights are human rights' paradigm.

Summary

'Labour rights are human rights' is a useful claim for labour lawyers and activists to make, in certain circumstances. It can bolster the political case for state intervention in the labour relationship, help rally support for workers' interests, and ultimately force concessions from management. However, 'labour rights are human rights' is ultimately unable to explain constitutional labour law. In part, this is because the practice of constitutional and international human rights law, and the decisions of courts, is rarely driven by human rights theory; this is all the more true of any theory capable of encompassing labour rights. More significantly though, 'labour rights are human rights' demands constitutional courts enforce labour-related socio-economic rights like 'decent pay' which does not match existing constitutional practice and raises serious questions of political legitimacy. Finally, most of constitutional labour law does not consist of 'labour rights', but rather of 'civil liberties' like freedom of expression. We need an alternative theory to explain why *these* rights should be enforced within the labour relationship, and why labour lawyers should care about them. Many scholars have tried to do this, and contemporary literature on the relationship between labour law and human rights has broadly moved away from the claim that 'labour rights are human rights' towards a new paradigm. The next section will consider their views as making up the paradigm of 'human rights at work'.

II. Human rights at work

In light of these difficulties with the 'labour rights are human rights' paradigm, the scholarly literature has evolved towards a new conception of the relationship between human rights and labour law. 'Human rights at work' is the title of one prominent book on

the subject,[91] and modules at a number of high-profile universities.[92] More generally, the literature in the field has broadly moved away from the question of whether, and which, 'labour rights' qualify as human rights, towards a consideration of the place of 'civil liberties' like privacy, freedom of expression, free practice of religion, *etc* in the labour relationship. Certainly this addresses some of the descriptive concerns expressed above about the 'labour rights are human rights' view – but ultimately this chapter will conclude that 'human rights at work' too fails to explain and justify constitutional labour law. First, an exposition of this model is required.

Paradigm shift

Recall that 'labour rights are human rights' asked whether pre-established 'labour rights' (whatever these might be) qualified as human rights (according to some theory of human rights). 'Human rights at work' takes the converse approach: it asks whether, why, and how we can apply things we know to be 'human rights', in a labour context. This approach has a number of immediate advantages: it does not require the tortuous clarification of a 'labour right' carried out above; nor does it necessarily require a theory of human rights to tell us what it means to 'count' as a human right, since the rights in question tend to be widely-accepted already. Crucial to this model is that the labour relationship is merely the *context* for a human rights claim; there is nothing specifically labour-related about the rights invoked.

A key driver of the shift from 'labour rights are human rights' to 'human rights at work' was the development of a substantial body of doctrine by the European Court of Human Rights protecting 'civil liberties' like privacy, freedom of expression, and free practice of religion from interferences by employers.[93] These decisions were initially few and far

[91] Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010). See also Robin Allen, Rachel Crasnow, Anna Beale, Claire McCann and Rachel Barrett, *Employment Law and Human Rights* (3rd edn, Oxford University Press 2018).

[92] Including, to the author's knowledge, University of Oxford, University of Bristol, University College London, and London School of Economics.

[93] For discussion, see Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013). Although the distinction between 'civil and political' and 'socio-economic' rights is fiercely contested, it is useful for the purposes of this chapter. For further discussion, see Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1994); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2019).

between;[94] indeed, most of the ECtHR case law involving labour issues was easily explicable under the model of 'labour rights are human rights', primarily concerned as it was with access to employment, freedom of association and the right to strike.[95] By the 2000s, it became clear that the Convention protects civil liberties within the labour relationship as well.[96] Many of these cases will be returned to in the doctrinal section of the thesis, but to take a very brief set of examples:[97] the ECtHR defended the right to private and family life in *Schüth v Germany*[98] and *Bărbulescu v Romania*,[99] freedom of expression in *Vogt v Germany*,[100] free practice of religion in *Eweida and others v United Kingdom*,[101] and equality in *IB v Greece*.[102]

Much of the literature on this topic is written from a UK perspective, where it seems to have come as a novelty to some labour lawyers that (a) civil liberties issues were relevant in the workplace, and (b) the courts were supposed to protect human rights against employers.[103] The result is that the predominant tenor of English-language scholarship on the subject is a cautious welcome tempered by instinctive scepticism. This mirrors the

[94] Virginia Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 15, 442. Elena Sychenko, *Individual Labour Rights as Human Rights* (Kluwer Law 2017) 3 calls this period the 'awakening of the sleeping beauty'.

[95] Virginia Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 443.

[96] Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) Modern Law Review 619, and 'An Emerging Human Right to Protection against Unjustified Dismissal' (2020) 50(1) Industrial Law Journal 36; Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76(5) Modern Law Review 909; Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022). This development was anticipated by John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001).

[97] For further discussion and a wider range of examples, see: Elena Sychenko, *Individual Labour Rights as Human Rights* (Kluwer Law 2017); John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001); Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022), 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial law Journal 504, and 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199; Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013).

[98] Application no 1620/03.

[99] Application no 61496/08.

[100] Application no 17851/91.

[101] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10.

[102] Application no 552/10.

[103] Leaving aside the question as to what extent this surprise was shared in other European jurisdictions: see, for example, Manfred Weiss, 'Fundamental Rights and Labour Law in Germany' in Roger Blanpain (ed), *Labour Law, Human Rights and Social Justice* (Kluwer Law 2001); Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010); Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013). See also Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019).

ambivalent relationship between 'human rights at work' and 'labour rights are human rights'. On one hand, 'human rights at work' affirms and legitimates the key insight that there are human rights issues at stake in the workplace, not 'merely' material self-interest.[104] However, this appears to come at the cost, from the perspective of traditional labour law, of shifting the focus as to what rights are most important. Non-material interests move centre-stage, with rights to privacy, freedom of expression, free practice of religion and non-discrimination pushing wages, working conditions and even trade unions to the side.[105] If this is the underlying basis for constitutional labour law, then constitutional labour law will look a lot less like traditional labour law, and threatens to displace it. This has, unsurprisingly, provoked resistance from labour lawyers.

Explanatory power of 'human rights at work'

'Human rights at work' faces three lines of criticism, each of which point us to ways in which it too suffers a 'justificatory gap' as regards constitutional labour law. The first two come from labour lawyers and activists, some aspects of which were mentioned in respect of the 'labour rights are human rights' model above. These are: first (the normative), why should labour law encompass 'human rights at work', and what is the relationship between these rights and traditional concerns of labour law? It transpires that the theory has its defenders here, whose arguments will follow – but there are two key issues left unresolved. Second (the practical), even if human rights *are* important, how are we to resolve the contradictions they throw up in labour *law*? Here, the justificatory gap is even wider. The third line of criticism comes from the perspective of constitutional lawyers, and will be elaborated below. First, the labour issues.

[104] Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41(2) New Zealand Journal of Employment Relations 3.

[105] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 150; Deirdre McCann, 'Decent Working Hours as a Human Right: Intersections in the Regulation of Working Time' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 18, 510; Emily A Spieler, 'Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right' in James A Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2003) ch 4, 82ff.

Normative significance of 'human rights at work'

(a) Individualism

The first concern expressed by labour scholars about 'human rights at work' is that human rights are inherently individualist and thus undermine the worker solidarity necessary for collective action.[106] The most trenchant advocacy of this objection is offered by Youngdahl: he argues that '[e]levating human rights to the dominant position within labour ideology will eviscerate support for the common concerns of all workers that is the keystone of labour solidarity'[107] and ultimately insists '[i]t is not hyperbole to say that the replacement of solidarity and unity… with individual human rights will mean the end of the union movement as we know it'.[108] Although the extent to which Youngdahl avoids hyperbole might be open to question, he is undoubtedly joined by a chorus of fellow objectors to the colonisation of 'collectivist' labour law by 'individualist' human rights. Strong claims are also made by Campbell, Ewing and Tomkins, who draw on Marx in contending that human rights belong to 'egoistic man… an individual withdrawn into himself', and are designed to detach 'private interests' from 'the community [and] political participation'.[109] McCrudden warns against 'sacrificing' labour law's 'crown jewels' of collectivism and solidarity 'for a much thinner set of individualist foundations'.[110] Less trenchantly, Hepple notes that 'growing individualization' tends to be a consequence of 'rights-based regulation of the labour market',[111] Bell observes that human rights claims 'commonly… reflect an

[106] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 39 considers this the 'strongest objection amongst scholars to embracing the rise of the rights discourse'. For her later treatment of this issue, see Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 42ff.

[107] Jay Youngdahl, 'Solidarity First: Labor Rights are Not the Same as Human Rights' 18(1) *New Labor Forum* 31, 32.

[108] Jay Youngdahl, 'Solidarity First: Labor Rights are Not the Same as Human Rights' 18(1) *New Labor Forum* 31 (internal quotations omitted).

[109] Tom Campbell, KD Ewing and Adam Tomkins, 'Introduction' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) ch 1, 2.

[110] Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 11, 289. See also Harry Arthurs, 'Labour Law After Labour' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1, 29, and 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 14 Social and Legal Studies 403.

[111] Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 2, 39 (internal quotations omitted).

individualization of disputes [and] a labour market of individuals where bonds of solidarity between workers may have declined',[112] and McCann expresses concern that 'the integration of human rights discourses into labour law could threaten to undermine the latter's collective values'.[113]

In respect of the argument that human rights are too individualist, four responses are made.[114] First, there is little evidence that thinking about labour issues in terms of human rights, and even the use of human rights law and litigation, has actually led to a diminution in the 'solidarity' of collective labour organisations.[115] Second, it is at least as plausible to claim that human rights have *contributed* to solidarity in a wider sense, by broadening the appeal of labour activism among civil society and political actors, on a domestic and international basis.[116] As mentioned above, this may be useful for organising a consumer boycott of businesses that do not pay decent wages, for example. Third, some human rights are collective in nature and thus *support* worker solidarity and collective action. In particular, there have been several high-profile decisions of the ECtHR that benefit trade unions, as part of the freedom of association protected by Article 11.[117] Fourth, some have argued convincingly that a *bit* of individualism is necessary and valuable within the labour movement – that workers are more likely to join in solidarity with their fellows if they

[112] Mark Bell, 'Constitutionalization and EU Employment Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 5, 143.
[113] Deirdre McCann, 'Decent Working Hours as a Human Right: Intersections in the Regulation of Working Time' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 18, 528.
[114] Despite these, even those who are ultimately unpersuaded by the criticism of 'human rights at work' as excessively individualist still recognise the validity of this concern: see Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 42-44, and 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 39ff; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 77ff; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, and 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 15, 442ff; ACL Davies, 'Workers' Human Rights in English Law' in the same volume, ch 6, 178-80; Lance Compa, 'Legal Protection of Workers' Human Rights: Regulatory Challenges and Changes: The United States' in the same volume, ch 10, 325.
[115] Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 43.
[116] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.
[117] Filip Dorssemont, 'The Right to Take Collective Action under Article 11 ECHR' in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013) ch 13; Virginia Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 15.

believe their own interests will still be protected, and that collective action is simply more legitimate when it is reliably considerate of individual interests.[118]

(b) Institutional concerns

A second prominent concern is that human rights are typically enforced by litigation, in courts that are unfriendly territory for the labour movement.[119] Rights are 'anti-political' in a way that is unhelpful to workers;[120] and wresting labour disputes from the inhospitable common law into dedicated labour institutions was a singular achievement of labour law reform.[121] This is a matter of trust (or lack thereof) in the judiciary,[122] in their legal training, inheritance and culture, as well as suspicion of their socio-economic interests and political sympathies.[123] The volume of literature expressing scepticism of judicial solidarity with the working class is to great to be recited here,[124] but for example, Ewing has noted that 'the need now is to rely on "high priests" of the law – legal professionals and judges – despite

[118] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 238; Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 15, 459ff.

[119] Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37(2) Dalhousie Law Journal 601, 609.

[120] Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition* (Hart Publishing 2014) 132ff; KD Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) Industrial Law Journal 391, 408; Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41(2) New Zealand Journal of Employment Relations 3.

[121] Mark Freedland, 'Otto-Kahn Freund, the Contract of Employment and the Autonomy of Labour Law' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 1. At 33, Freedland says the 'judiciary, so long as they remained the primary exponents of the law of the contract of employment would continue to regard and fashion [the law] according to an implicit paradigm of the "master-servant" relation'.

[122] Mark Freedland, 'Otto-Kahn Freund, the Contract of Employment and the Autonomy of Labour Law' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 1, 35.

[123] *Cf* Dan Priel, 'The Political Origins of English Private Law' (2013) 40(4) Journal of Law and Society 481.

[124] James A Gross, 'A Long Overdue Beginning' in James A Gross (ed), *Workers' Rights as Human Rights* (Cornell University Press 2003) ch 1, 18; Tom Campbell, KD Ewing and Adam Tomkins, 'Introduction' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) ch 1, 4-5, Danny Nicol, 'Business Rights as Human Rights' in the same volume, ch 11; Judy Fudge, 'Constitutionalizing Labour Rights in Europe' in the same volume, ch 12; Mark Bell, 'Constitutionalization and EU Employment Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 5, 143; Lance Compa, 'Legal Protection of Workers' Human Rights: Regulatory Challenges and Changes: The United States' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 10, 325.

the latter in the past having been nearly always unsympathetic to trade unions and their goals'.[125]

Defenders of 'human rights at work' point to the very *existence* of constitutional labour law as evidence to the contrary. But even if the detractors' claim is true that judges are not natural allies of workers, that misses the point that the involvement of workers and their organisations in the legal system, including in constitutional and human rights cases, is inevitable. Even if workers do not take litigation on the basis of human rights, employers (or the state) will. Constitutional labour law will develop regardless of whether labour wants it to, and if labour is absent from the development of these legal doctrines, they will develop against labour's interests. Framing labour disputes in terms of human rights is far more likely to win over lawyers and judges to the side of workers than unfurling the Red Flag in the courtroom. After all, it is widely-acknowledged that courts are *very* interested in human rights (particularly in the sorts of 'civil liberties' that arise under this paradigm), and guard them jealously.[126] This suggests courts are more likely to be worker-friendly under a human rights approach to labour law.[127] Unfortunately, this is something of a double-edged sword for the labour movement: success in the courts on human rights issues may further entrench a litigation-centred strategy, and may sideline collective action and trade unions all the more.

(c) Autonomy

Closely related is the next objection: the risk human rights allegedly pose to the autonomy of labour law as an academic and practical discipline. From the early work of Kahn-

[125] KD Ewing, 'Foreword' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) x. Likewise, Judy Fudge, 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37(2) Dalhousie Law Journal 601, 612 counsels that 'judges should not let their class biases influence their interpretation [of the law]'; and Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2012) 32 Comparative Labor Law and Policy Journal 217, 226 criticises the 'hyper-juridification of the employment relationship'.
[126] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), and *Justice for Hedgehogs* (Harvard University Press 2013).
[127] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151.

Freund[128] and Wedderburn[129] up to a recent collection edited by Bogg *et al*,[130] a consistent theme in labour scholarship has been to assert this autonomy. It is stressed how significant an achievement it was to carve out a specific body of labour law, distinct from the ordinary law of contract and from the regulation of 'combinations' (*ie* treating trade unions differently from cartels). Labour law thus comes with its own dedicated university modules, textbooks, terminology, normative principles, methodology, courts and other institutions, international organisations, even government departments.

Several commentators argue that any conception of human rights broad enough to *justify* labour law actually threatens to *subsume* it.[131] For her part, Fredman sees this as a benefit, at least insofar as it answers the question whether areas of law like 'discrimination law should reflect the assumptions of labour law on the one hand or human rights law on the other' in favour of the latter.[132] Ewing, however, protests: 'Are labour lawyers merely handmaidens in the service of those who work in other disciplines…?'[133] Of course, this risk of colonisation by human rights is not unique to labour law: scholars in many disciplines have identified the looming prospect of theirs becoming a branch of 'applied human rights law'.[134] Doctrinal autonomy is never airtight, of course, but it does matter: Arthurs has pointed out the specific dangers to worker identity and to the integrity of the

[128] Discussed in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, 'Introduction' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 2.
[129] KW Wedderburn, *The Worker and the Law* (1st edn, Penguin 1965), and 'Labour Law: From Here to Autonomy?' (1987) 16(1) Industrial Law Journal 1.
[130] Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).
[131] Deirdre McCann, 'Decent Working Hours as a Human Right: Intersections in the Regulation of Working Time' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 18, 528; Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 11.
[132] Sandra Fredman 'Equality Law: Labour Law or an Autonomous Field?' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 10, 262.
[133] KD Ewing, 'Foreword' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ix.
[134] Jan Smits, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert Lindenbergh (eds), *Constitutionalisation of Private Law* (Koninklijke Brill 2006) ch 2; Matthias Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341; Olha O Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?' (2007) 3 Utrecht Law Review 1; (2006) 7(4) German Law Journal 341 Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 35-36.

discipline of labour law as firmly grounded in the particular practical realities of the workplace.[135]

Given that the specifically labour-related interests appear less normatively compelling than some of the other interests protected by their new bedfellows in general human rights law, their protection might be afforded a lower priority. If human rights lawyers (of which labour lawyers become a subset) have to choose, as a matter of practical, institutional, political or intellectual resources, between pursuing protection against torture on the one hand, and collective bargaining on the other, they are likely to (not unreasonably) prioritise the former. The more labour relies on human rights, the weaker their normative claims might appear if they are necessarily being compared with other concerns of human rights law. Using human rights as a moral or political argument for labour interests is at once highly enticing but also potentially counter-productive: it elevates (some) labour law to the sphere of human rights law and practice, but affords it a relatively low rank within that domain.

(d) Priorities

The flip side of the argument that human rights theory and law has little interest in labour issues is that the labour movement has little interest in human rights. Rather, labour activism and law has traditionally been concerned with 'bread and roses' issues of pay, conditions and leisure time, and the rights of trade unions to act and bargain collectively on behalf of workers. This might even be considered a stronger version of the disciplinary autonomy claim above – a sort of *normative* autonomy claim, that labour law has special goals and values that are unique to it. Chiefly these goals are materialist and practical, in a way that 'human rights' (particularly 'civil liberties') are not generally considered to be.[136] The next chapter will discuss in more detail the traditional 'constituting narrative' of labour law,[137] which seems to support this explicit and determined focus on material well-being over more ephemeral issues like 'human rights'. It is not entirely clear why a constitutional

[135] Harry Arthurs, 'Foreword' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018), and 'Labour Law After Labour?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1.
[136] See Guy Mundlak 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8(2) Theoretical Inquiries in Law 719, and 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2012) 32 Comparative Labor Law and Policy Journal 217. See also Tyler Cowen 'Work Isn't So Bad After All' in Elizabeth Anderson, *Private Government* (Princeton University Press 2017) ch 6.
[137] Harry Arthurs, 'Labour Law After Labour?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1, 17.

labour law that so heavily involves issues of civil liberties is worth the labour movement's effort.

Arthurs goes further, in expressing scepticism of the 'idealist tendency' in labour law altogether – decrying efforts 'to discover the chimerical "philosopher's stone" [that] will one day enable us to convert dark satanic mills into temples of just and joyful employment'.[138] He exhorts labour law theorists to at least wed their scholarly efforts to a healthy respect for labour law's 'muscle and blood' tradition, based on practical power struggles between organised labour and capitalist employers. Hyde outright castigates the 'scholars in the tower' who spend their time devising ever more elaborate incarnations of 'the Idea of Labour Law'.[139] He presents such theorising as 'just ways of coping with the disappearance of the pillars [of labour law]: oligopolistic employers, unions, jobs, strikes, or new law'.[140] To the extent these 'muscle and blood' labour lawyers see any value in human rights at all, they are likely to prefer 'labour rights are human rights' to 'human rights at work'. They place greater store in trade union activism and other forms of collective action to protect workers' interests than human rights[141] – so they will cheer[142] decisions like *Demir and Baykara v Turkey,*[143] while their attitude towards the 'civil liberties' cases recited above ranges from ambivalence to hostility, viewing them as a distraction from labour's true goals.[144]

[138] Harry Arthurs, 'Foreword' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) v.
[139] Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6, 90.
[140] Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6, 91.
[141] Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2012) 32 Comparative Labor Law and Policy Journal 217.
[142] This ambivalence is typified in the work of Ewing: compare KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39(1) Industrial Law Journal 2; Alan Bogg and KD Ewing, 'The Implications of the RMT Case' (2014) 43(3) Industrial Law Journal 221; KD Ewing, 'Foreword' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010); Tom Campbell, KD Ewing and Adam Tomkins, 'Introduction' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) ch 1.
[143] Application no 34503/97.
[144] See, for example, KD Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) Industrial Law Journal 391.

Practical implications

(a) Deflation

The injection of human rights discourse into labour law is 'deflationary' in one of two senses: either workers will find themselves limited in respect of the demands they can make against employers to those that can be framed in terms of human rights (deflating non-human-rights-based claims), or rights-discourse will be devalued by excessive implausible invocation (deflating human rights themselves). Bargaining for a ten o'clock start time *might* be framed as a human rights issue if, for example, a parent wanted to start work later so he could bring his children to school in the morning (right to respect for family life) … but it is a stretch. It is certainly far from clear that 'human rights' are the best way to frame that negotiation. This seems to create a two-tier system of labour protections: workers who can draw a more plausible connection between their specific demands and an underlying human rights issue will get a lot further than those who cannot. Labour issues not framed in terms of human rights will be devalued, notwithstanding that these might be of the most immediate practical benefit to workers.[145] Of course, this is not a concern if one believes that *all* of labour law ultimately has its foundations in human rights – but the bulk of scholarship on this topic concludes it does not,[146] except perhaps at a level of abstraction that renders human rights unhelpful in determining the content of labour law norms.[147]

Against the Scylla of demand-limitation is set the Charybdis of rights-deflation. A worker might attempt to avoid limiting his demands by invoking human right principles in an ever-broader range of circumstances. However, it seems clear that if every demand a worker might make is couched in terms of human rights, that may debase rights-discourse, and

[145] Philippa Collins, *Putting Human Rights to Work* (Oxford University Press 2022) 38, and 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 40-41; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 88.

[146] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020), and 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9.

[147] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 154 claims there is an inevitable trade off between the plausibility of deriving a piece of labour law from human rights, and the specificity of that right.

drain the normative force from arguments that legitimately relate to human rights issues.[148] It was identified above that one of the major benefits of a human rights approach is that human rights are widely considered to be more important that other considerations, to have an added rhetorical and normative heft. Obviously, this only persists so long as human rights are deployed *sparingly*, in circumstances where their invocation is truly warranted. Workers *do* need human rights in some circumstances, but 'the worker who cried human rights' in respect of every issue at work will quickly find that his appeals to human rights are no longer taken seriously, or that human rights lose their power to 'trump' other concerns. At a certain level of abstraction, one might well argue that every issue in the workplace touches on *some* human rights principle or value (after all, the subjects of labour laws are human beings) – but again, at that level of abstraction, the human rights claim does very little to assist in resolving the dispute in practice. This conclusion need not come from a position of general scepticism of human rights:[149] indeed, if one believes human rights are important, then to compromise their distinct normative value in political and legal discourse is all the more serious. Human rights claims should be saved for when it really matters, because there *are* (extreme) circumstances in which workers may need human rights claims. This suggests we need to be selective in what rights find their way into constitutional labour law.

(b) Utility

Some of those labour lawyers who are suspicious of the arrival of human rights into labour law point to a propensity for human rights claims to help *employers* rather than workers.[150] Although long-since repudiated by the US Supreme Court, the very name *Lochner v New York*[151] sends a collective shiver down the spines of labour lawyers on both sides of the Atlantic. European jurisdictions have their own ignominious roll call of cases in which 'human rights' were used to dismantle protection for workers, some of which will be examined later in the thesis. It is important to stress that these are not merely *failed attempts*

[148] See discussion in Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 40-42; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 88-89.
[149] Although it frequently does: see the various contributions to Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011).
[150] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 56: 'there is no apparent reason why the insertion of rights into private law should help weaker parties against stronger ones.'
[151] (1905) 198 US 45.

to use human rights to protect workers, in the vein of, say, *RMT v United Kingdom*.[152] Although such failures do lead some to question the effectiveness of a human rights strategy, it is the spectre of *employers* successfully relying on human rights claims which discredits the entire endeavour in the eyes of some critics: for example, Nicol argues that human rights are inextricable from 'business rights',[153] and Moyn draws attention to the historical association of human rights with modern neoliberal economics.[154] Furthermore, we see ample use of human rights norms to undermine collective action by vindicating rights of individual workers who disagree with the collective – for example, the determination that closed shops violate the right to disassociate of workers.[155] This is not necessarily the case even for 'labour rights are human rights', to say nothing of more traditional approaches to labour law.

Critics of 'human rights at work' draw attention to a number of decisions in which human rights have either failed to help, or actively hurt, workers' interests; proponents in response point to a long series of worker-protective decisions in recent years.[156] That is an empirical debate that is beyond the scope of this thesis to resolve. However, even if one could count up all the constitutional labour law cases workers have won, and those they have lost, that will not really tell us whether constitutional labour law is 'good' or 'bad', never mind answer the central research questions at the heart of this thesis. Despite its Marxist flavour,[157] the instrumentalist idea that constitutional or other human rights litigation is

[152] Application no 31045/10.
[153] Danny Nicol, 'Business Rights as Human Rights' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) ch 11. See also Andreas Kulick, 'Corporate human rights?' (2021) 32(2) European Journal of International Law 537.
[154] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[155] See, for example, *Young, James and Webster v United Kingdom* Applications nos 7601/76 and 7806/77; discussed in Virginia Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) ch 15.
[156] Some of these are recited above, and others will be discussed in more detail in Part III of the thesis. For the moment, *cf* (for example) *Lochner v New York* (1905) 198 US 45 and *Sørensen and Rasmussen v Denmark* Applications nos 52562/99 and 52620/99 on the one hand, and *Wilson and others v United Kingdom* Applications nos 30668/96, 30671/96 and 30678/96, *Demir and Baykara v Turkey* Application no 34503/97 and *Bărbulescu v Romania* Application no 61496/08 on the other. For a historical discussion of the situation in the USA and Canada, see Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 108ff. For further discussion on the theme, see Hugh Collins, 'Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) ch 11, and 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 55ff; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 84-87.
[157] Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 156.

simply a useful means to advance the cause of labour will always be contingent on the very next decision by a court. It is unlikely to hold much sway in shaping those decisions since it ultimately fails to articulate a theoretical or normative framework for constitutional labour law and its proper place in labour law. It fails to explain why courts *should* decide these cases in favour of workers, being content to celebrate those occasions when they do and decry when they do not.[158] Whether one thinks a constitutional labour law case is decided rightly or wrongly must depend on some theory of how courts should decide constitutional labour law cases. It is that theory we need to find.

An underlying theoretical problem with the 'human rights at work' paradigm lies in that there are often human rights on both sides of a dispute between a worker and employer. At the very least, the employer may invoke his property rights or something like the 'freedom to run a business' enshrined in Article 16 of the EU Charter. In other circumstances, there will be a clash between, for example, the right to family life of a worker and the employer's free practice of religion;[159] a worker's freedom of expression and the reputation of the employer;[160] *etc*. Throw the rights of *other* workers,[161] and customers,[162] into the mix, and there is clearly a need for 'balancing' in respect of the various rights involved. Although 'human rights at work' acknowledges the prospect of such conflicts (indeed, in a sense, presupposes it), it does not give us any immediate indication of how to resolve them. This is a flaw in any approach that simply takes labour as the *context* for an independent human rights claim (by whatever party). On its own, that will always fail to quite account for the particularities of the employment relationship, and perpetuate the 'fictional equality' of the parties that underpins traditional contract law. Some kind of normative argument about the value of human rights to workers will be needed in order to resolve these conflicts of rights.

So from the labour perspective we can see three unresolved concerns: normatively, we need to discern what is specifically 'labour-related' about constitutional *labour* law that preserves the autonomy of labour law and theory, and is worth attracting the attention and

[158] *Cf* KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39(1) Industrial Law Journal 2 and Alan Bogg and KD Ewing, 'The Implications of the *RMT* Case' (2014) 43(3) Industrial Law Journal 221.
[159] *Schüth v Germany* Application no 1620/03; *Obst v Germany* Application no 425/03, *Fernández Martínez v Spain* Application no 56030/07.
[160] *Redfearn v United Kingdom* Application no 47335/06.
[161] *IB v Greece* Application no 552/10.
[162] *Redfearn v United Kingdom* Application no 47335/06.

resources of labour lawyers and academics; practically, we need to resolve the selectivity problem, and account for balancing and adjustment of rights. Some of these are themes that arise in constitutional scholarship too, alongside fresh concerns.

The constitutional critique

The third line of criticism of 'human rights at work' comes from constitutional scholarship, and involves three elements: selectivity, waiver and horizontality. Of these, much has been said about selectivity already in this chapter: we need some theoretically-robust way of deciding *which* rights should apply at work, and to what extent. These arguments will not be repeated here.[163] That leaves waiver and horizontality as key issues.

(a) Waiver

First, there is the problem that in the employment context, a worker will generally have *consented* to the interference with his rights, by agreeing to the employment contract which provides for the actions of an employer which amounted to the breach of rights.[164] As Collins points out, the ability to accept limited and temporary restrictions on one's rights is vital to accomplish all sorts of valuable goals.[165] It must be possible to 'give up' at least *some* human rights by means of a contractual obligation not to exercise them, to exercise them in a particular way, or to assign to someone else the power to decide how they are exercised – otherwise, it would be impossible to sell or lease property, for example.[166] By its very nature, 'the contract [of employment] will necessarily limit the liberty of an individual, if only by virtue of its requirement that the worker should attend the workplace during the prescribed hours'.[167] We can think of many other instances of the exercise of certain rights being necessarily governed by contract for the employment relationship to

[163] In addition to what is cited in respect of 'labour rights are human rights' above, see: Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 63, 68-69, 84-88, 144-45 and sources cited therein.
[164] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 55ff, 202ff.
[165] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 57.
[166] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 35-36. See also Jan Smits, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert Lindenbergh (eds), *Constitutionalisation of Private Law* (Koninklijke Brill 2006) ch 2, 20.
[167] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 57.

function at all, like an employee being obliged to speak to customers on behalf of the company (freedom of expression) and associate with colleagues (freedom of association).[168]

But constitutional labour law by its very nature enforces rights against employers, including by modifying or overriding contractual terms to the contrary where necessary. So our theory needs to explain *which* rights cannot be waived in such circumstances, or at least the limitation on *how much* a right can be waived … and in either case *why*.

Atkinson[169] and Collins[170] have separately discussed the potential for implied terms of the contract of employment to protect human rights, thereby presupposing that courts should be very slow to find a waiver of rights unless it is explicit and fully-informed. Some attempts have been made to argue that the defence of 'consent' to a human rights claim is itself 'unconvincing'[171] in the context of employment because we are always suspicious of the extent to which workers truly consent to the terms of the contract of employment – the famous 'inequality of bargaining power'.[172] As will be explored in Chapter 5, however, this sort of paternalistic basis for what amounts to a prohibition on the waiving of certain rights is difficult to sustain. First, constitutional labour law seems to require that even where consent was freely given, rights may override the terms of the contract. Second, it remains unclear why only *some* rights would be protected from waiver on the basis that consent is suspect in the circumstances, but not others. Third, we are faced with the question whether it is possible to waive a right to some extent, but not entirely – and if so, how much?

[168] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 245 acknowledges that '[w]orkers may genuinely consent to interferences with their human rights in some cases'.
[169] Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48(4) Industrial Law Journal 515.
[170] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) ch 7 and 8, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial law Journal 504, and 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199.
[171] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 245.
[172] This will be discussed further in Chapter 3.

(b) Horizontality[173]

Second, we have the problem of horizontality. Obviously, the question of horizontal effect of human rights is far broader than constitutional labour law as defined in this thesis; thus what follows is merely an aspect of a larger discussion that is beyond this thesis. In many jurisdictions, the horizontal application of human rights and other constitutional norms is the subject of fiercely-contested debate.[174] Questions around the legitimacy and practicality of the horizontal application of rights have received considerably more attention from constitutional scholars than in the labour law literature which informed the criticisms advanced earlier in this chapter.[175]

Much of the English-language scholarship on the challenges of horizontality discusses private law generally,[176] but there is widespread acknowledgement that horizontal rights would be particularly relevant for labour law.[177] Remember that we are recounting the objections to the application of human rights within the labour relationship in order to expose the gaps this thesis needs to fill – although constitutional labour law is not reducible to horizontal rights, any theory justifying constitutional labour law will have to overcome these objections. Broadly, four sets of challenges may be identified: (i) to the nature of the

[173] For an overview of most of the issues which are to follow in this section, see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019). More specific references to Frantziou's book will be made below.

[174] For an overview, see Andrew Clapham, *The Human Rights Obligations of Non-State Actors* (Oxford University Press 2006). As Paul Craig and Gráinne de Búrca, 'Series Editor's [*sic*] Preface' in Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) vii put it, 'Whether fundamental rights should be applicable solely or primarily against the state, or whether they can also have application between private actors, is an endemic issue that has to be decided by all legal systems.'

[175] It is worth pointing out this attention to theoretical detail is not always shared by *courts* in those jurisdictions where there is great academic debate. This is particularly true of the CJEU: see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 2.

[176] Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 11, fn 1.

[177] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3; Mark Bell, 'Constitutionalization and EU Employment Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 5; Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 21ff.

legal system;[178] (ii) to the rule of law;[179] (iii) to private autonomy; and (iv) to the content of rights themselves. Due to space constraints, it has been decided to concentrate on the most important for the purposes of this thesis: private autonomy and the content of rights.

(i) Private autonomy

The objection here is that the autonomy of employers is undermined if they are obliged to respect the human rights of workers.[180] Within a liberal constitutional democracy, constitutional norms will have to account for the fact that private individuals will seek to manifest their own values and protect important interests of theirs through economic activity, including as employers.[181] Part of this critique is that such interference with economic freedom is undemocratic, either because the market itself allows participants to 'vote with their feet', or because horizontal enforcement of rights accords too much power

[178] Especially the public-private law divide: see Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Hugh Collins, Paul Davies, and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law 2000) 6; Matthias Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341; Olha O Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?' (2007) 3 Utrecht Law Review 1; Mark Bell, 'Constitutionalization and EU Employment Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 5, 139; Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in the same volume, ch 2; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 247ff. This distinction is problematised by Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 5, 15, 18-20, 26-27, 68. This is related to the discussion of 'direct' and 'indirect' effect of horizontal rights. Except where specifically discussed in later chapters, it does not matter very much on a theoretical level whether rights are applied directly or indirectly. The interpretation of a statute or contract, for example, still requires an interpretive theory, which is what this thesis aims to provide. Frantziou adopts a similar approach: see 38ff, 186-87.

[179] The concern here is that constitutional norms are too vague to govern private conduct, and their application disturbs settled doctrines of private law: see Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 11, 217, and 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 42; Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Peer Zumbansen and Ruth Buchanan, *Law in Transition* (Hart Publishing 2014) ch 7, 133; Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 17; Philippa Collins, 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199. For discussions in an Irish context, see William Binchy, '*Meskell*, the Constitution and Tort Law' (2011) 33(1) Dublin University Law Journal 339, 343ff; Gerard Hogan, 'The Farthest – December 1972' (2019) 62 Irish Jurist 1.

[180] A more general discussion about the autonomy of private defendants to horizontal human rights claims is found in Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 17, 20ff, 26-27, 50, 172.

[181] Of course, many employers, strictly speaking, are legal persons (such as corporations). However, in this thesis, when we speak about 'employers' we include individual managers or owners who make productive decisions. How this manifests in practice will become clear in Chapter 5 and in Part III.

to the judiciary, at the expense of the legislature.[182] However, there is a more fundamental concern.

Proponents of the 'autonomy' critique of horizontal rights believe 'it is wrong to try evaluate the contract of employment by reference to the values developed in the context of political theory and theories of constitutional government… we should not evaluate as if it were an institution dedicated to liberal values of justice.'[183] As Smits puts it: 'the application of universal standards of what is regarded as fair in the relationship between the State and the citizen… to private parties can also be looked at with suspicion.'[184] Despite some similarities,[185] we need to recognise that private employers are *not* the state, and that the 'imposition of a duty on every individual to observe, and perhaps protect, fundamental rights seems to represent a significant change in standard liberal accounts of the relation between citizens… we will be held to more perfectionist standards.'[186] Elsewhere, Collins puts the claim more starkly: horizontal rights amount to 'the imposition of unwelcome (illiberal) values by forcing individuals to comply with public standards of political correctness'.[187]

[182] Martin B Margulies, 'Standards of Review and State Action under the Irish Constitution' (2002) 37(1) Irish Jurist 23, 29. For a rebuttal, see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 48. This will be returned to in Chapter 5.

[183] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 63. See also Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277.

[184] Jan Smits, 'Private Law and Fundamental Rights: A Sceptical View' in Tom Barkhuysen and Siewert Lindenbergh (eds), *Constitutionalisation of Private Law* (Koninklijke Brill 2006) ch 2, 9.

[185] Elizabeth Anderson, *Private Government* (Princeton University Press 2017); Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9. Martin B Margulies, Standards of Review and State Action under the Irish Constitution' (2002) 37(1) Irish Jurist 23, 29 argues it is only appropriate to impose rights-burdens on private actors when they conduct themselves as 'agents of the state'.

[186] Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 11, 222. Collins gives the 'traditional account' as one which 'grants considerable negative liberty in the sense that it says we can live our lives as we wish, provided that we do not harm others in various material ways.'

[187] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 27. Martin B Margulies, Standards of Review and State Action under the Irish Constitution' (2002) 37(1) Irish Jurist 23, 30 calls the horizontal enforcement of rights 'an obligation, incumbent upon the relatively wealthy, to subsidise the [rights] of others…'. Sandra Fredman, *Human Rights Transformed* (Oxford University Press 2008) 25 uses this exact line of reasoning to argue for the opposite conclusion: that there is no conceptual distinction between horizontal and vertical rights because private individuals are also obliged to bear whatever costs and burdens are associated with rights against the state, through taxation.

Atkinson tackles this issue in two ways: one, he says *moral* rights 'impose obligations on individuals and non-state actors as well as on the state. The normative implications of human rights are therefore not limited to the vertical relationship between state and individuals';[188] two, he argues that the *state* fails in *its* duty to protect rights where (through its legal, economic and property system) it allows, facilitates or incentivises private actors to violate rights.[189] (This latter line of argument supports the sorts of arguments that have found favour in German scholarship and judicial decisions on horizontal application of constitutional rights.)[190] Unfortunately, neither argument can explain (a) why some of these moral rights (and potentially not others) need enforcement by law at all; (b) why against private employers in particular; and (c) if they do, why the enforcement should be by means of *constitutional* labour law. Atkinson's theory does not address these questions.

Collins gets us closer. First, she says, 'employers are not equivalent to other private actors'.[191] They are distributors of important opportunities, and have greater *capacity* to inflict harm than other actors.[192] Second, 'the employment relationship is not equivalent to a contractual relationship between two private individuals', because of the level of ongoing, open-ended decision-making *authority* that employers are legally empowered to exercise over workers.[193] These are crucial insights; however, she still does not manage to resolve the issue of why the enforcement of workers' rights against employers is a matter of constitutional concern (ultimately advocating instead for a set of legislative reforms).[194] Chapter 5 will take these arguments further in its justification of constitutional labour law.

[188] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 197.
[189] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 247.
[190] See Matthias Kumm, 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7(4) German Law Journal 341.
[191] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 21.
[192] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 21-22. See also Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 68, 126-27, 134-35, 165-66.
[193] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 23ff.
[194] Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018), and 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199. Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) makes a much stronger case in this respect: she says 'the workplace has acquired particular prominence as a forum of organised political activity' (25) and the labour relationship 'bear[s] *public* significance' (27; emphasis original). As such the protection of rights therein is a 'social good' (127), to the extent these rights act as 'legitimating conditions' for the state (57); this idea will be returned to in Chapter 5.

A more specific objection to the imposition of duties to respect human rights on employers is that, as we saw above, employers have rights too. Notwithstanding the complexity of public policy debates, the enforcement of a right against the state is a theoretically straightforward process of checking whether the state has a good reason to interfere with a right, and whether the interference is proportionate to that aim. The state usually cannot advance a human rights claim of its own.[195] However, in a private dispute, very often both parties will have rights at stake, perhaps even the same right. Therefore, horizontal enforcement of rights often requires *balancing* of rights, an altogether more complicated assessment than (vertical) proportionality.[196]

Some commentators advocate avoiding the problem of balancing altogether by imposing *asymmetrical* rights obligations.[197] They draw by analogy on the legislative protection against discrimination, which identifies specific duty-holders (employers, landlords, shops, *etc*) and prohibits *them* from discriminating, *but not others*. That is to say, an employer cannot refuse to hire me because I am a man,[198] but I remain free to refuse to work for her because she is a woman. Both private lawyers and constitutional lawyers have cause to object to such an asymmetrical approach to the enforcement of rights: in principle, the rights of workers and employers are equally 'fundamental', and all persons are equally entitled to have their rights vindicated. If we are to systematically favour protection of *workers'* rights, we need some theory to explain why that is appropriate.

So we need to explain either (a) how to balance competing rights in the labour context; or (b) why employers should be singled out for asymmetric rights protection (*ie* duties but no rights). As Kumar says, both of these remain under-theorised:

[195] In its capacity as a property-owner, the state may be able to rely on property rights.
[196] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 49ff; Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 11, 221ff; Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Peer Zumbansen and Ruth Buchanan, *Law in Transition* (Hart Publishing 2014) ch 7, 133-34.
[197] See, for example, Philippa Collins, 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199.
[198] Subject to limited provision for 'positive action' to promote gender equality: see Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ('Recast Sex Directive'), article 3.

> …we do not know what happens when workers' and employers' human rights conflict… We do not know if, when or why some kinds of 'workplace' human rights trump others. Moreover, and critically, if human rights conflict, we do not know if their resolution will be made in favour of workers in principle, consonant with the purpose of international and national labour law regimes – *ie* to assuage the unequal bargaining power between workers and employers – or if there will be cases in which workers' rights must be or become subordinate to private power and capital in order to protect the human rights of employers.[199]

(ii) Content of rights

In order to accommodate the fact that private defendants themselves have rights, which must be balanced against those of the rights-claimant in a way that is not necessary where the claim is advanced against the state, horizontal rights seem to have a different *content* to vertical ones. They are *called* the same things: 'freedom of expression', *etc*. But in their substance, their practical effect, they are different. Collins calls this 'the translation of transplanted rights',[200] arguing:

> It would be a mistake for a court simply to take the meanings of a concept such as freedom of speech or privacy that have been established in disputes between the state and the citizen and then apply them to the different context of a private law dispute… the idea of liberty or freedom differs between the contexts of public law and private law.[201]

In a sense, modification of rights is the answer to the problem of private autonomy discussed above. It is the recognition that yes, imposing the same duties to respect rights on private actors as on the state *would* be unduly burdensome, costly and disrupt their ability to live their lives as they wish. So instead we should impose some *lesser* duty to protect the same (abstract, underlying) right. As will be demonstrated in Part III, courts

[199] Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Peer Zumbansen and Ruth Buchanan, *Law in Transition* (Hart Publishing 2014) ch 7, 134.
[200] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 46.
[201] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 58-59.

generally do temper the enforcement of certain rights in order to accommodate employer interests, and to reflect the fact that while employers might be state-like in some respects, many of them lack any remote approximation of the state's capacity to interfere with rights (and capacity to protect them).

However, merely acknowledging the need to modify the content of rights does not tell us what modifications are appropriate. We saw above how human rights are based on interests important enough to justify placing duties on others. If my interest in freedom of expression is so important, then it cannot be the case that the interest disappears for eight hours a day, five days a week. But if the protection of my freedom of expression in the workplace is less extensive than its protection in the public square, I will want to know *how much* less, and *why*. 'Less enough to adequately protect the rights of the employer as well' is not an answer: how much is 'enough' to 'adequately' protect rights in any given case must depend on the reasons we have for protecting the right in that context.[202] To borrow from the language of the proportionality test as it is conventionally formulated, the way in which the employer wants to restrict my rights might well be a 'legitimate aim' on his part, but not necessarily 'appropriate means'.[203] This will be returned to in Chapter 5.

Constitutional labour law's justification gap

Summarising the issues raised in the previous section that remain to be resolved, we see the existing literature's 'justification gap' with respect to constitutional labour law. We have a normative concern that the sorts of issues constitutional labour law tends to deal with – particularly civil liberties – are not 'labour-significant'; and labour law will lose its normative salience within any theory broad enough to encompass human rights in the workplace. On a practical level, it is difficult to select which rights should be enforced by means of constitutional labour law, and to what extent these should be balanced against the interests of employers, customers, *etc*. We need to explain why constitutional labour law should prevent workers from signing away certain rights in employment contracts, and what it is about the labour relationship that requires rights be protected against private

[202] *Cf* Jeremy Waldron, 'Rights in Conflict' (1989) 99(3) Ethics 503.
[203] As will be seen in Part III of this thesis, broadly equivalent language of legitimate aim, means rationally connected to that aim, least restrictive means, and overall proportionality or balancing, is used to describe the proportionality test under the ECHR, EU law, and various domestic legal systems. In Ireland, the canonical formulation is found in *Heaney v Ireland* [1994] 3 IR 593 (HC).

employers. Beyond all of these critiques within literature dominated by human rights, we need to explore what else is involved in constitutional labour law that does not reduce to a battle of rights.

We can see that many of these issues are interrelated at the level of theory. If the workplace is merely the context for an ordinary human rights claim, then labour law would at most be a *fetter* on (independent) human rights (of a worker or employer), an unnecessary roadblock to the delivery of human rights in their purest form. To account for these concerns, any theory of the role of human rights in the labour relationship will have to be firmly grounded in the particularities of work, and delimit the role played by human rights from other areas of labour law. This means explaining the importance of the labour relationship to the theory, and identifying the issues in respect of which human rights are most relevant and helpful.

We will have to explain why labour should care about human rights in general, and in particular the sorts of rights that are prominent in 'human rights at work' approaches to constitutional labour law: privacy, freedom of expression, free practice of religion, equality, *etc*. For reasons that will become clear in later chapters, we do not claim that these rights are more important than the material interests of workers (whether these latter are framed as 'socio-economic rights' or in some other way), but there are good reasons for labour law and labour organisations to be concerned about them.

In other words, the key for a satisfactory theory of constitutional labour law is to convince labour to 'take rights seriously'[204] as a specific normative goal *of the labour movement itself*. This decidedly does *not* mean convincing labour lawyers and trade unionists to down tools and retrain as human rights practitioners; that would result in the loss of valuable institutional knowledge, the deflation of workers' distinctly labour-related interests, and the sidelining of their most effective institutions.[205] Conversely and complementarily, we need to demonstrate why the labour relationship is a matter of *constitutional* concern, to explain why constitutional norms should apply horizontally within it.

[204] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[205] It would probably be counter-productive anyway: finding itself unable to adequately address the specific context of the labour relationship, human rights law would inevitably need to develop a speciality in labour issues – in other words, if labour law did not exist, we would have to (re)invent it.

Of course, this normative gap has not gone unnoticed in the 'human rights at work' literature.[206] One response holds that the entirety of labour law can be derived from human rights principles.[207] It is pretty clear from the existing literature that this claim is unsustainable. First, it is profoundly ahistorical: labour law in Europe simply was not developed with human rights in mind.[208] On its own, this would not be fatal, because it is possibly early labour were guided by a nascent understanding of human rights before that terminology really caught on. Second, however, we have seen above how difficult it is to cast many labour laws in terms of human rights, and how dangerous it might be to try – either other labour claims will be diminished, or human rights themselves will be deflated. Third, while there are obviously moral principles underpinning labour law, there is no reason to think that political morality is exhausted by (human) rights.[209] Far from being reducible to a single normative foundation, 'labour law may well be morally overdetermined', with 'any single theory… likely to provide only partial foundations for the discipline.'[210] This strong derivation claim is essentially the 'context' approach rebranded: there is no obvious reason why labour law is needed at all if, ultimately, it is (only) human rights themselves that matter. The majority of the literature on this subject makes a weaker claim, that labour law has multiple normative foundations, of which human rights are one.[211] This neatly side-steps most of the criticisms levelled at 'human rights at work' outlined above: in particular, it does not claim that human rights on their own should act to exclude all other priorities for the labour movement, nor that the practice of labour law is a mere branch of human rights law. It can even accommodate concerns that the 'foxes

[206] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 16-17.
[207] Joe Atkinson, 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7, 126ff.
[208] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 143-44; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).
[209] Joseph Raz, 'The Nature of Rights' in *The Morality of Freedom* (Oxford University Press 1988) ch 7.
[210] Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 17.
[211] Hugh Collins, 'The Productive Disintegration of Labour Law' (1997) 26 Industrial Law Journal 295; Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press 2016); Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 1, 20; Joe Atkinson, 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 16.

have rights too',[212] by acknowledging that other labour law values might tip the balance in favour of workers where both sides assert human rights.

The next chapter of this thesis will discuss the normative pluralism of labour law in greater detail. This thesis does not deny that human rights must have some role to play in the justification of labour law, and that there are strong connections between human rights law and theory on the one hand, and constitutional labour law on the other. It would be foolish, in light of the substantial body of literature on the subject and the benefits identified above, to downplay the salience of human rights in the contemporary practice and study of labour law. Obviously, constitutional labour law refers to human rights norms – our definition of constitutional labour law above identified human rights as among the 'constitutional norms', perhaps the most common set of norms, by which courts determine constitutional labour law cases. However, it is argued here that human rights on their own are insufficient to explain and justify constitutional labour law. Not only are there other things apart from human rights at stake, but even when we are within the realm of rights constitutional labour law only protects *some* human rights, to *some* extent. Even if the normative element of the justificatory gap were resolved, we would still have descriptive and practical holes to fill. Therefore we will always be in need of some additional justificatory value or concept to complete our understanding of constitutional labour law, from among labour law's pluralist normative foundations. The next chapter will show how this can be found in the concept of citizenship.

Conclusion

This chapter considered the two ways of thinking about the relationship between human rights and labour law, and the protection of the former by means of the latter, which have been established in the literature on this topic written over the past twenty or so years. We saw that while 'labour rights are human rights' is certainly a useful claim for labour lawyers and activists to make in appropriate circumstances, it is ultimately unable to explain constitutional labour law. It seems to demand that constitutional courts enforce labour-related socio-economic rights like 'decent pay' which is largely not reflected in prevailing

[212] Hugh Collins, 'Justice for Foxes: Fundamental Rights and Justification of Indirect Discrimination' in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) ch 11.

practice, and raises questions about the constitutional separation of powers. Nor can it explain why the bulk of constitutional labour law consists not of 'labour rights' but of 'civil liberties'.

The 'human rights at work' approach affirms that there *are* human rights issues at stake in the workplace, not 'merely' material self-interest.[213] However, many labour scholars are concerned about the apparent shift in focus as to what rights are most important. Non-material interests like rights to privacy, freedom of expression and free practice of religion upstage wages, working conditions and trade unions. Moreover, some activists are wary of entrusting workers' interests to lawyers and judges, who have traditionally been unsympathetic to the cause of labour, and fear the loss of labour law's autonomous doctrines and institutions. For their part, constitutional lawyers have concerns of their own about 'human rights at work', particularly about waiver and horizontality. Moreover, to account for the rights of private employers, the rights of workers need to be balanced and modified in a way that leaves it unclear how 'human rights at work' relates to the broader project of human rights protection… and how much utility there is for workers in a human rights approach anyway.

In the round, then, its critics argue that 'human rights at work' distracts from the core aims of labour law, and that a human rights approach is an unreliable means to an uncertain end.[214] Not all of these charges have been answered by the existing literature. Nevertheless, constitutional labour law clearly exists, and demands explanation and justification. Therefore, a more descriptively accurate and normatively robust theory of constitutional labour law is required. It is clear this justification must be in normative, theoretical terms: empirical 'counting cases' for and against will not satisfy, and does not help courts decide the next case. Instead, this thesis will offer a theoretical defence of constitutional labour law. This chapter has illustrated a number of key elements for which any such theory must account. These include:

[213] Virginia Mantouvalou, 'Labour Law and Human Rights' (2016) 41(2) New Zealand Journal of Employment Relations 3.
[214] Joe Atkinson, 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7, 126.

1. What sorts of rights should be protected by constitutional labour law;
2. Why these rights are an important concern for labour law;
3. Why these rights should be enforced horizontally *at all*, and why against private employers *in particular*;
4. To what extent the rights should be balanced or adapted to the employment context;
5. Why the rights in question should be entrenched against waiver by the worker in a contract of employment; and
6. Why this is an appropriate subject matter for *constitutional* intervention and concern.

Furthermore, it is also worth recalling, again, that constitutional labour law is not exhausted by individual rights, but involves constitutional norms more broadly.

Developing a theory of constitutional labour law that accounts for all of these issues is the task of this thesis. The effort begins with Chapter 3, which searches in the pluralist normative foundations of the discipline of labour law for a normative concept around which to build our theory of constitutional labour law, alighting upon one of its higher aspirations: to facilitate the participation of workers as citizens of a constitutional democracy.

PART

II

INTRODUCTION TO PART II

This is a brief introduction to explain the structure and purpose of Chapters 3, 4 and 5. As became clear at the end of Chapter 2, constitutional labour law faces a 'justificatory gap' in the existing literature. There are significant normative and practical difficulties from the perspective of both labour law and constitutional scholarship, which neither of the prevailing bodies of research – 'labour rights are human rights' and 'human rights at work' – can answer satisfactorily.

Part II will develop an alternative account that is both more descriptively convincing and more normatively compelling. First, Chapter 3 will explore the theoretical justifications for labour law in general, to search among the pluralist constitutive narratives of the field for a normative goal around which to build a theory of constitutional labour law. Finding this in the 'political participation' strand, the chapter highlights the importance to the labour law project of helping workers to function as citizens. Chapter 4 takes up the baton and develops a theoretically rich conception of 'citizenship', comprising three elements of participation, membership-based rights and non-domination. Chapter 5 shows how this concept of citizenship is capable of justifying – indeed, demands – a certain model of constitutional labour law. It relates citizenship to the questions posed at the end of Chapter 2: horizontality, waiver, and selectivity and adaptation of rights.

This Part is the core of the thesis' original contribution to academic scholarship in this field. It creates a robust theoretical foundation for the examination in Part III of the practicalities of constitutional labour law, including reference to doctrinal examples of how these practical issues can be addressed.

CHAPTER 3:

THE THEORY OF LABOUR LAW

Introduction

A wealth of recent literature has examined the goals and values at stake in the regulation of working life: the 'boundaries and frontiers',[1] 'normative framework',[2] 'autonomy',[3] 'philosophical foundations',[4] and even the very 'idea'[5] of labour law. Most authors have written in response to a widely-perceived crisis of legitimacy and effectiveness in the regulation of work,[6] some arguing that scholars in the field ought to radically rethink the normative underpinnings of labour law to resolve this crisis.

This author is mindful of Hyde's criticism that the multiplicity of normative visions for labour law may undermine, or at least distract from, concern for its practical efficacy.[7] In any event, the elaboration of new normative foundations of the entire field of labour law both is beyond the scope of this thesis, and has been convincingly offered by more renowned and authoritative voices in the field in recent years.[8] However, it is clear that the

[1] Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006).
[2] Nuna Zekić, 'The Normative Framework of Labour Law' [2019] Law and Method <http://www.lawandmethod.nl/tijdschrift/lawandmethod/2019/9/lawandmethod-D-18-00004> accessed 9 September 2020.
[3] Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015).
[4] Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018).
[5] Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).
[6] For discussion of the nature of this perceived crisis, see Guy Davidov and Brian Langille, 'Introduction' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 1, 1ff: 'The laws regulating and protecting people at work are in crisis'; Guy Davidov and Brian Langille, 'Introduction' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 1ff: 'Labour law is widely considered to be in crisis, at least by scholars of the field'; Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 1, 3ff: 'the very idea of labour law is under attack'.
[7] Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6.
[8] For a selection, see the various contributions to: Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006); Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011); Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015); Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018). See also Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014); Elizabeth Anderson, *Private Government* (Princeton University Press 2017).

existing literature has struggled to accommodate the specific phenomenon of constitutional labour law elaborated in Chapter 1. Attempts to explain this in terms of 'labour rights are human rights' or 'human rights at work' are deficient, for the reasons explored in Chapter 2. Therefore, the goal of this thesis is to make a contribution, however modest, to the ongoing discussion of labour law's philosophical or normative foundations by elaborating a theoretical explanation and defence of constitutional labour law.

In order to do so, this chapter will discuss the established normative justifications for labour law, arguing that these various strands should best be viewed as a form of progression. The lesson will be drawn from existing labour scholarship, both recent and historical, that a central concern of labour law is, and always has been, to allow workers to participate as full, equal citizens in a constitutional democracy. It is this aim, rather than the more readily-available justifications of labour law like efficiency or the inequality of bargaining power that properly explains constitutional labour law, and suggests a path for its ongoing development.

The cause of labour[9]

Much of the literature referred to above articulates a variety of responses to the nagging question of what labour law is *for*:[10] why do we have it, and why do we study it?[11] Labour law is generally on the defensive in this regard, since it is seen as a departure from or intrusion on the ordinary law of contract, and therefore in need of justification.[12] The

[9] For alternative approaches to the task of this chapter, see; Frank Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3(2) European Labour Law Journal 108; and Guy Davidov, 'Articulating Labour Law's Goals: Why and How?' (2012) 3(2) European Labour Law Journal 130.

[10] This thesis will largely avoid the equally intense debate over the 'autonomy' of labour law: what marks labour law out as distinct from other areas of legal regulation, such that it amounts to a coherent field of inquiry on its own? As was noted in Chapter 2, however, one objection to the inclusion of human rights at work within the scope of labour law is that it risks subsuming labour within a broader field of human rights; this issue will be returned to.

[11] Matthew W Finkin, 'The Death and Transfiguration of Labor Law' (2011) 33 Comparative Labor Law and Policy Journal 171 considers much writing in this vein to be 'packed with… argument and angst… grief and despair', and that the only people who care about such questions are university professors who have to decide what should go on the syllabus for a labour law class.

[12] Harry Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 Comparative Labor Law and Policy Journal 585, 586; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 9, 137. Of course, placing the burden of justification on labour law does seem to be an unfair stacking of the deck in favour of deregulation of labour markets: as Cristina Inversi, Lucy Ann Buckley and Tony Dundon, 'An Analytical Framework for Employment Regulation: Investigating the Regulatory Space' (2017) 39(3) Employee Relations 291 have pointed out, there is simply no such thing as

literature reveals a multiplicity of such justifications, which several authors have tried to accommodate into categories or strands: for example, Bagenstos posits the 'efficiency' and 'inequality of bargaining power' dichotomy;[13] Cabrelli and Zahn add 'social justice' to this list, as well as their proposed rationale of 'non-domination';[14] Collins *et al* offer 'liberal values', 'distributive justice', 'democracy', and 'social inclusion',[15] while cautioning against trying to develop a 'general theory' of labour law.

Clearly, labour law is a field characterised by normative pluralism. This could mean one of two things: (a) various theorists propose multiple, competing and mutually-exclusive, foundational single rationales for the discipline; (b) there are multiple, complementary and non-rivalrous, values at work in explaining and justifying various labour laws. As stated above, this thesis does not purport to join the ranks of (a). It does not claim that the building of constitutional citizenship is *the* defining goal or explanatory rationale for all of labour law. It agrees with Collins *et al* that an attempt to justify every aspect of the regulation of people's working lives by reference to a single moral or political value is doomed to failure – labour lawyers will not find the 'philosopher's stone' of the entire discipline.[16] However, the prevailing way of thinking about (b) is dissatisfying. From works like that of Davidov and Langille, and Collins *et al*, one is left with the impression the normative values of labour law are something of a grab-bag, a hearty philosophical broth of ingredients from the cupboard marked 'good intentions'. One easily understands the frustrations of Hyde, who condemned what he saw as the ever-expanding normative pluralism of a discipline increasingly untethered from the reality of working people's lives.[17]

'deregulation' in the context of the labour relationship: rules are needed to co-ordinate production; if the state does not regulate working life through laws, private economic actors (particularly employers) will fill the 'regulatory space'. So the question is never really whether to 'regulate' or 'deregulate' the labour market, but rather *who* is to do the regulating.

[13] Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 229-30.

[14] David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6.

[15] Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 1, 20.

[16] Harry Arthurs, 'Foreword' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018). For further advocacy of the 'eclectic' scholarly tradition in labour law, see Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33(1) International Journal of Comparative Labour Law and Industrial Relations 7.

[17] Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6.

The aim of this chapter is to show how political independence and participation in the constitutional democratic state is *a* (albeit not *the*) concern of labour law. Taking the lead from the authors just mentioned, it will draw out from existing labour scholarship a number of 'strands' of normative justification for labour law. However, in light of the dissatisfaction with (b) referred to above, it will argue that these can be viewed in terms of a progression or levels of concern – a Maslow-style 'hierarchy of needs' for workers.[18] Different labour laws 'kick in' at different levels, but a well-rounded system of labour law will aim to keep in mind the higher goals, and any system of labour law can be criticised for falling short of or regressing from its higher aspirations.[19] It should be stressed that this progression is not meant to represent a historical trend within labour law (*ie,* that first labour law must or has tended to accomplish the lower levels, before moving on to the next). Rather, they represent ways of *thinking* about labour law, ways to explain and defend existing patterns of labour laws while providing normative guidance for development and reform of those laws. Thinking about the normative values within any one strand and the sorts of laws they produce, leads to thinking about values which develop further strands. This chapter will show how those ways of thinking about labour law relate to one another, in a way that is more helpful than the sort of pluralism *simpliciter* criticised above. The normative strands, arranged according to this idea of progression, are:

1. Efficiency
2. Welfare
3. Dignity
4. Syndicalism
5. Political participation

Each of these strands will be considered in turn, the arguments of the most prominent authors therein summarised, and conclusions drawn which lead onto the next strand in the progression. Ultimately, this thesis will build on the political aspirations of labour law to develop an account of citizenship in a constitutional democracy that entails political independence for workers from bosses, and labour's participation in the government of the

[18] See Abraham Maslow, 'A Theory of Human Motivation' (1943) 50(4) Psychological Review 370.
[19] This is not to say that the 'higher' goals are necessarily more normatively valuable than the 'lower' ones – as the comparison with Maslow shows, obviously the lower goals are often extremely compelling, but once those are sufficiently attained, labour law should move up the ladder.

state and civil society on equal terms with the owners of capital. It will argue for a vision of society in which workers do not 'cringe beneath the rich man's frown',[20] but rather can look management in the eye as *concitoyens*.[21] First, however, the analysis begins with the earlier strands of justification.

Efficiency

The efficiency strand of labour law justification argues labour laws constitute and regulate the market for human labour, in line with a set of economic policy goals and in light of the insights of economic and social science.[22] Labour law is a regulatory technique which is required because, left to their own devices, markets for human labour do not function as well as other markets, and can be made more efficient through certain kinds of intervention.[23] The market failures identified in literature include information asymmetry, inelasticity of labour supply, collective action problems, low investment in increased productivity, and high transaction costs.[24] The efficiency strand is not necessarily value-neutral, but it does downplay political and socio-economic conflict and the competing interests at stake in the labour relationship.[25] It is open to the promotion of non-efficiency values external to the market through labour law, but is relatively agnostic as to what these are or should be. Primarily, it pursues labour law's 'productive' goal, rather than any

[20] Jim Connell, 'The Red Flag' (1889).
[21] *Cf* the 'eyeball test' in Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 47, and *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 5.
[22] See, for example, Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983), *Labour Law Text and Materials* (2nd edn, Weidenfeld and Nicolson 1984), *Labour Legislation and Public Policy* (Oxford University Press 1993), and *Towards a Flexible Labour Market* (Oxford University Press 2007); Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford University Press 2004). The development of the efficiency strand is summarised admirably by Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 92-122.
[23] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 125. See also Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in the same volume, ch 9.
[24] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 125.
[25] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 10, 194.

protective purpose.[26] As such, it tends to seek out *economic* benefits from labour regulation.[27]

Dukes subjects this view, which she calls the 'law of the labour market paradigm', to a number of wide-ranging criticisms, which are beyond the scope of this thesis to engage with.[28] The most important of these for present purposes is her claim that the important question is never what makes labour markets function 'better', but rather better *for whom*.[29] Labour markets are characterised by inherent conflicts of interest – profits, after all, are unpaid wages.[30] The problem with the efficiency strand, why it does not quite capture the hearts and minds of most labour lawyers, is that it fails to answer one fundamental question historically posed by the labour movement: 'which side are you on?'[31] It assumes there is always a 'third way'[32] between the interests of labour and capital, downplaying and sterilising the economic and political conflicts at the heart of labour regulation.[33] Rather than technocratic management of a market to make it function more efficiently, the bulk of labour scholarship prefers not only to acknowledge this conflict, but to explicitly take a side in it.

[26] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 123. Of course, many scholars writing in this area remain committed to protecting workers' interests: see, for example, Simon Deakin and Frank Wilkinson, *Labour Standards – Essential to Economic Progress* (The Institute of Employment Rights 1999).

[27] See, for example, Simon Deakin and Frank Wilkinson, *The Economics of Employment Rights* (The Institute of Employment Rights 1992) and *Labour Standards – Essential to Economic Progress* (The Institute of Employment Rights 1999); Simon Deakin, *The Contribution of Labour Law to Economic Development and Growth* (Centre for Business Research, University of Cambridge 2016).

[28] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 92-122, in particular 105-6.

[29] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 195.

[30] Karl Marx, *Value, Price and Profit* (Eleanor Marx Aveling (ed), CH Kerr 1913) ch 11: 'The surplus value, or that part of the total value of the commodity in which the surplus labour or unpaid labour of the working man is realized, I call profit.'

[31] Florence Reece, 'Which Side Are You On?' (1931).

[32] Hugh Collins, 'Is There a Third Way in Labour Law?' in Joanne Conaghan, Richard M Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002). See also Sandra Fredman, 'The Ideology of New Labour Law' in Catharine Barnard, Simon Deakin and Gillian S Morris, *The Future of Labour Law* (Hart Publishing 2004) ch 1.

[33] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 6-7.

Welfare

Most labour scholars have a more ambitious vision than the more efficient functioning of labour markets – they have a 'vocation'.[34] Even the reputed *doyen* of free markets,[35] Adam Smith, said: 'Whenever the legislative attempts to regulate the differences between masters and their workmen… [are] in the favour of the workmen, it is always just and equitable'.[36] Labour law has a purpose, goal or normative vision: the 'protection of workers'.[37] This raises obvious questions: protection from what, being done by whom? Why is labour law needed to afford this protection, and how is this to be done? Labour scholars do not always agree on the answers to these questions, but there is a broad response recognisable to anyone in the field, and well-established in the literature.

People work to obtain the material benefits necessary to live comfortably.[38] Labour law is supposed to help workers secure material benefits like higher wages, safer and easier conditions of work, and more rest time[39] – in the iconic parlance, 'bread and roses'.[40] In the ordinary course of events, employers do not like giving workers wages and rest, nor keeping them safe, all of which costs money and reduces profits. The concern of the capitalist enterprise is to maximise the return from capital investment to capital; badly-paid, tired workers toiling in unsafe conditions are only a problem to the extent productivity is affected. Some workers can rely on capital's enlightened self-interest to protect them: those

[34] Hugh Collins, 'Labour Law as a Vocation' (1989) 105(Jul) Law Quarterly Review 468.
[35] Although Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 6, 17ff argues this characterisation is unfair, and that Smith was only instrumentally attached to free markets for the social egalitarianism they appeared to support in pre-industrial society.
[36] Adam Smith, *The Wealth of Nations* (Modern Library 1965) 142. See also Tony Topham, 'New Types of Bargaining' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 144; Paul Foot, 'The Seamen's Struggle' in the same volume 206.
[37] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 1; Nuna Zekić, 'The Normative Framework of Labour Law' [2019] Law and Method <http://www.lawandmethod.nl/tijdschrift/lawandmethod/2019/9/lawandmethod-D-18-00004> 3, accessed 9 September 2020; Harry Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 Comparative Labor Law and Policy Journal 585; Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 112: 'the purpose of labour regulation is to improve the lives of the inhabitants of the world, insofar as work has something to do with it'.
[38] See the various contributions to Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015), in particular Alan Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in that volume, ch 9.
[39] Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8(2) Theoretical Inquiries in Law 719.
[40] James Oppenheim, 'Bread and Roses' (1911).

whose skills are in high demand, for example. Others are left at capital's mercy – a commodity for which demand always outstrips supply.

So we can see general answers to the questions about protection from what (material deprivation and harm), and from whom (employers). At this point in the Socratic defence of labour law rehearsed to various conclusions in the literature mentioned above, the interlocutor to whom labour law is justifying itself typically asks why these material conditions, if they are so important to workers, cannot be secured through the ordinary process of negotiating the contract of employment. The answer labour law traditionally gives is that in negotiating a contract of employment, individual workers suffer from inequality of bargaining power versus prospective employers.[41] As a result, each worker agrees a contract which is harmful to his material interests (wages too low, conditions unsafe, rest time inadequate, *etc*).

Inequality of bargaining power

Inequality of bargaining power is the fabled bogeyman of labour scholarship, stalking workers wherever they turn for sustenance, undermining any claim to 'freedom' of contract in respect of labour, and necessitating a raft of labour law protections.[42] Bogg calls it 'a credo for the discipline'.[43] It drives the narrative of labour law's historical development

[41] Guy Davidov and Brian Langille, 'Introduction' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 1, 3; Brian Langille, 'Labour Law's Back Pages' in the same volume, ch 2, 22-23; Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in the same volume, ch 7, 138; Manfred Weiss, 'Re-Inventing Labour Law?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 3, 44; David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6, 104-05.

[42] For further discussion of the centrality of inequality of bargaining power as a justification for labour law, see Robin Blackburn, 'The Unequal Society' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 41; Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 26; Harry Arthurs, 'Labour Law After Labour?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1, 16-17; Cristina Inversi, Lucy Ann Buckley and Tony Dundon, 'An Analytical Framework for Employment Regulation: Investigating the Regulatory Space' (2017) 39(3) Employee Relations 291; Noah D Zatz 'Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 9, 158; Nuna Zekić, 'The Normative Framework of Labour Law' [2019] Law and Method <http://www.lawandmethod.nl/tijdschrift/lawandmethod/2019/9/lawandmethod-D-18-00004> 7, accessed 9 September 2020.

[43] Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 391.

from the Industrial Revolution through to its post-war heyday in the West, its centrality to this story exemplified by the famous quote from Kahn-Freund: 'The main object of labour law has always been, and… always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[44]

The source of inequality of bargaining power, the reason why it is considered 'inherent', is ultimately the interplay between extant patterns of private ownership of the means of production[45] and the ability to defer gratifications[46] (or as Gourevitch calls it, 'the sword of want').[47] Sure, the owner of capital needs labour for the productive process ('without our brain and muscle, not a single wheel can turn')[48], but not as urgently as the worker needs access to material benefits. The worker can withhold his labour to drive a harder bargain, but only so long as he has access to some other source of sustenance: 'It is during the strike that the ultimate dependence of the worker on the next week's wage becomes dangerously clear.'[49]

Modes of regulation

The next question is how labour law accomplishes the goal of protection of workers in the face of this inequality of bargaining power. By and large, there have been two responses to the problem posed by inequality of bargaining power, each with its champions in the welfarist strand (although most labour lawyers advocate a combination of the two): increase worker's bargaining power; or remove some matters from bargaining altogether. Historically, the former has been accomplished by empowering organisations to represent

[44] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18.
[45] *Cf* Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1994) chs 10, 12, and 13.
[46] Robin Blackburn, 'The Unequal Society' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 41.
[47] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 81ff.
[48] Ralph Chaplin, 'Solidarity Forever' (1915).
[49] Robin Blackburn, 'The Unequal Society' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 41. Of course, this makes the extent of inequality of bargaining power empirically-contingent on the relative material resources of the bargaining partners: see Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 7, 140-41; and Hugh Collins, 'Labour Law as a Vocation' (1989) 105(Jul) Law Quarterly Review 468, 478-79.

workers and bargain collectively on their behalf; the latter by legal intervention by the state to set some terms and conditions of employment.[50]

Kahn-Freund believed it was best to give legal protections to trade unions, and leave them to negotiate with employers on workers' behalf, with minimal state interference:[51] the doctrine of 'collective *laissez-faire*'.[52] This approach recognises that one of the issues bound up in the problem of inequality of bargaining power is that each individual worker may be weak, but for all workers together, 'the union makes us strong'.[53] A strategy of collective *laissez-faire* does not mean there is no 'labour law', but rather labour law is *procedural* in nature. Workers and their collective organisations secure the *substantive* benefits they want through the use of industrial action and autonomous collective bargaining with employers (both individual firms and employers' representative organisations). As such it relies on worker voice to achieve substantive outcomes, while labour law merely creates the conditions for that voice to be heard effectively.[54]

It is now widely recognised that collective *laissez-faire* is insufficient to protect workers in most jurisdictions, not least because of the decline in trade union density and the corresponding increase in the power of capital (particularly multi-national capital in an era of globalisation).[55] The alternative strategy pursued by labour law is to directly intervene

[50] Brian Langille, 'Labour Law's Back Pages' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 2, 20ff. For more on how the inequality of bargaining power paradigm leads to a particular focus on collective bargaining as a solution, see Harry Arthurs, 'Labour Law After Labour?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 1, 17.

[51] Of course, John Gardner, 'The Contractualisation of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 2, 33 reminds us that: 'As Kelsenians will tell you, the law is never strictly out of anything.'

[52] This concept is elaborated throughout Kahn-Freund's work: see the extensive catalogue in Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 231-32.

[53] Ralph Chaplin, 'Solidarity Forever' (1915). See also Joe Hill, 'There is Power in a Union' (1913) and the different song of the same title, Billy Bragg, 'There is Power in a Union' (1986).

[54] For more on worker voice, see Alan Bogg and Tonia Novitz (eds), *Voices at Work* (Oxford University Press 2014); Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017); Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 195; Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 66, 69; Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 391, 412-13, and 'Labour Law and Trade Unions: Autonomy and Betrayal' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 3, 73-75; Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 231, 234.

[55] Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 6; Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 69-70; Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 115ff.

in the employment relationship by providing *substantive* protections for workers in the form of minimum wages, maximum hours, health and safety obligations, anti-discrimination protection, conditions on dismissal and redundancy, *etc*.[56] Substantive intervention is generally complementary to worker voice, because it leaves open the prospect that higher wages *etc* can still be bargained for (either individually or collectively); however, it has the benefit of alleviating a certain amount of the burden on the weaker party (the worker) to bargain over these things. As such it recognises the value of worker voice, but also its limitations.

Summary

That, in short, is the traditional story of labour law.[57] Workers need material benefits, and must reach a bargain with employers (the owners of capital) to obtain them.[58] Because there exists inequality of bargaining power between workers and employers, workers typically agree to contracts of employment that provide them with inadequate benefits.[59] Therefore, they need the assistance of collective representative organisations, and the state through its regulatory capacity, to ensure they get a better deal.[60]

This story has already come under criticism from a number of authors.[61] The centrality inequality of bargaining power has been called into question, particularly in light of modern trends away from formal, long-term contracts of employment towards more casual working patterns. There has been much discussion over whether inequality of bargaining power is still so bad a problem as it used to be (or whether it ever was);[62] or, conversely, whether it

[56] Brian Langille, 'Labour Law's Back Pages' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 2, 20ff.
[57] See also Guy Davidov and Brian Langille, 'Introduction' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 2ff.
[58] As Joan Robinson, *Economic Philosophy* (Penguin 1962) 46 put it: 'the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all.'
[59] Brian Langille, 'Human Development: A Way Out of Labour Law's Fly Bottle' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 5, 90.
[60] Manfred Weiss, 'Re-Inventing Labour Law?' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 3.
[61] Guy Davidov and Brian Langille, 'Introduction' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).
[62] Tyler Cowen, 'Work Isn't So Bad After All' in Elizabeth Anderson, *Private Government* (Princeton University Press 2017) ch 6; Hugh Collins, 'Labour Law as a Vocation' (1989) 105(Jul) Law Quarterly Review 468, 478-89.

disguises and obscures a much bigger problem in labour relations.[63] The strategic question of trade union empowerment or individual legal protection has been extensively debated.[64] Scholars, lawyers and legislators have grappled with how to define the scope of labour law's protective function – which workers need protection, against which kinds of other actors in the economy?[65] Who should be left to bargain at arms-length like pre-industrial merchants and artisans? Some of these issues will be returned to below, and in other chapters. For the moment, however, this chapter will focus on one particular line of criticism of the traditional narrative recounted above, and how it leads us to a broader set of goals for labour law: the sort of harms labour law is supposed to protect against.

Dignity

A rationality consisting of the protection of workers in the face of inequality of bargaining power has driven labour regulation, both collective and individual, since at least the Industrial Revolution. Language around dignity at work, and the dignity in work, is also seen in leading judicial decisions like *Ruffley v Board of Management of St Anne's School*[66]

[63] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3; Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 365, 374; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 50.

[64] See for example: KW Wedderburn, *The Worker and the Law* (1st edn, Penguin 1965); Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 13, 86ff; Jay Youngdahl and Lance Compa, 'Should Labor Defend Worker Rights as Human Rights? A Debate' (2009) 18(1) New Labor Forum 31; Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet' (2012) 34 Comparative Labor Law and Policy Journal 217.

[65] For a sample of the voluminous literature on this topic, see: Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 7; Katherine VW Stone, 'Rethinking Labour Law: Employment Protection for Boundaryless Workers' in the same volume, ch 8; Kamala Sankaran, 'Protecting Workers in the Informal Economy: The Role of Labour Law' in the same volume, ch 10; Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in the same volume, ch 13; Judy Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in the same volume, ch 14; Mark Freedland, 'Application of Labour and Employment Law Beyond the Contract of Employment' (2007) 146 International Labour Review 3; Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2011), and 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46(1) Industrial Law Journal 52. See also Harry W Arthurs, 'The Dependent Contractor – a Study of the Legal Problems of Countervailing Power' (1965) 16 University of Toronto Law Journal 89; Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001); ; Guy Standing, *The Precariat* (Bloomsbury 2011); Jeremias Prassl, *The Concept of the Employer* (Oxford University Press 2015), and *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018).

[66] [2017] IESC 33; see also Patrick Marron and Ellen O'Callaghan, '*Una Ruffley and the Board of Management of St Anne's School* [2017] IESC 33 – "A Benchmark for All Bullying Claims"' (2017) 14(3) Irish Employment Law Journal 76.

and *NVH v Minister for Justice and Equality*.[67] Although the nature of modern capitalism places many of the key concepts and modalities of labour law under strain (key challenges being the decline in trade union density and the rise of models of labour relation other than the traditional contract of employment) nobody seriously doubts that, in general, employers are more powerful than workers,[68] and that workers need protection from the harm that power imbalance tends to produce. The next strand of labour law normativity seeks only to enhance the range of interests recognised by labour law as worthy of protection.

These scholars protest that man does not live on bread and roses alone, so labour law should also be concerned with securing other, non-material benefits for workers, and protecting them from other forms of maltreatment. It develops on the 'roses' part of the welfarist demand, arguing that a dignified life is more than its material conditions – it involves a level of interpersonal respect and regard. Coates, for example, contends that workers actually care more about fair treatment than about material benefits: they seek an 'ethos' of what he calls 'fairation' at work, a common 'standard of what is tolerable and what is not'.[69] Following Marx, he argues that disputes with employers over bread-and-roses issues are 'unavoidable guerrilla fights' but not the ultimate goal of the labour movement.[70]

Labour is not a commodity[71]

A hint of these 'deeper claims'[72] is given in the International Labour Organisation's insistence that 'labour is not a commodity'.[73] Langille has also structured an analysis of labour law's normative foundations in terms of the twin slogans, 'inequality of bargaining power' and 'labour is not a commodity',[74] arguing that the latter is much broader and richer

[67] [2017] IESC 35.
[68] Noah D Zatz 'Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 9, 158.
[69] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 82.
[70] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 76.
[71] International Labour Organisation, Declaration of Philadelphia 1944.
[72] Tony Topham, 'New Types of Bargaining' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 141: 'Pure wage claims should be seen as deflections and mystifications of much deeper claims'.
[73] Declaration of Philadelphia 1944.
[74] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 105ff.

than the former.[75] Indeed, he says that without 'labour is not a commodity', an aversion to inequality of bargaining power cannot take us very far; we would not care very much about inequality of bargaining power if labour *were* a commodity like any other.[76] Similarly, Fudge characterises labour as a 'fictive commodity', inseparable from the bodies and therefore lives of real human beings,[77] so labour law must care about all that it is to be human.

For labour law to focus entirely on material protections for workers would certainly make labour a *more expensive* commodity, but could never decommodify labour. It does not matter that gold is more expensive than gravel: both are mere 'raw materials' for production in a capitalist enterprise; both are owned and used, bought and sold, albeit for different prices. Labour scholarship, and the labour law it inspires, resists such commodification of human labour. The idea that labour is not a commodity has two dimensions: first, there are dignitarian interests at stake in the labour relationship which demand fair treatment and interpersonal respect at work; second, workers (not being commodities) have inherent agency which must be recognised by employers.

Many scholars use terms like 'wage slavery' to capture the interests and harms at stake in the labour relationship which go beyond material conditions.[78] Marx himself said: 'An enforced increase of wages [is] nothing but better payment for the slave, and would not win either for the worker or for labour their human status and dignity.'[79] Coates elaborates:

> A wage slave does not cease to be a wage slave when he can buy a refrigerator. Roman slaves might be thin or fat, sad or cheerful… You cannot tell a wage slave by his looks. You can tell him by the fact that on Monday he says 'Roll on Friday'.

[75] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 110.
[76] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 110.
[77] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 129ff.
[78] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 64.
[79] Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Martin Milligan tr, 2nd edn, Lawrence & Wishart 1981).

> He is defined by the fact that he lives in little islands of freedom called 'leisure'… It is hard to be a five-day slave, free at weekends.[80]

The well-fed slave is no less a slave for that; he suffers profound harms of recognition and esteem. The next chapter will discuss slavery and the republican concept of 'domination' as it relates to these dignitarian harms. Various labour scholars[81] and political theorists[82] have pointed to the labour relationship as a prime example of interpersonal domination; indeed, Pettit argues that the appeal of his theory of republicanism to those on the political Left is precisely its aversion to 'wage slavery'.[83] The interpersonal relationship between workers and management is the focus of concern for the 'labour is not a commodity' strand, a relationship characterised, in the absence of labour law, as one of gross disrespect:

> Yet further indignities were added [to material deprivation] by the autocratic and dictatorial attitudes of employers and superiors… Owners treated their workers as if they were in the armed services: those who protested against their conditions were regarded as mutineers.[84]

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[80] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 74-75.

[81] Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115; Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232; Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 391; Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 365; David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6; Dáire McCormack-George, 'Well-Being, Skills and Work in a Neorepublican EU: The Case of Third-Country Nationals' (PhD thesis, Trinity College Dublin 2020) 52-72 and sources cited therein, particularly fns 1 and 2.

[82] Philip Pettit, 'Freedom in the market' (2006) 5(2) Politics Philosophy and Economics 131, and *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 141ff; Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151; Alex Gourevitch, 'Labor Republicanism and the Transformation of Work' (2013) 41(4) Political Theory 591, and *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) particularly 111ff; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 52 and *Private Government* (Princeton University Press 2017); Geneviève Rousselière, Jason Frank and John P McCormick, 'Labor Republicanism: Symposium on Alex Gourevitch's *From Slavery to the Cooperative Commonwealth*' (2020) 48(4) Political Theory 496; Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548, 554ff.

[83] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 141ff. Although Pettit's republicanism is broadly social-democratic, Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548 argues for an outright 'socialist republicanism'.

[84] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 105.

Anderson refers to the 'expressive injury' occasioned when a person in authority makes a decision in such a manner that demonstrates to the subject of the decision that his interests, and views, do not 'count' in the reasons for or against the decision.[85] She quotes from Smith:

> What chiefly enrages us against the man who injures or insults us, is the little account which he seems to make of us, the unreasonable preference which he gives to himself… that other people may be sacrificed at any time, to his conveniency or his humour. The glaring impropriety of his conduct, the gross insolence and injustice which it seems to involve in it, often shock and exasperate us more than all the mischief which we have suffered.[86]

Anderson characterises the workplace as 'private government': decisions are made about workers which the decision-makers consider to be none of the workers' business, and treat them disrespectfully.[87] As we will see later in Chapters 6 and 7, there is intrinsic dignitarian harm done to workers in such circumstances. Labour law must, therefore, be concerned with dignitarian, as well as material, harms to workers. The desire for fair treatment suggests additional areas of concern for labour regulation. For instance, it introduces the need for fair procedures in decision-making at work,[88] and the need for 'rule of law' constraints on both managerial discretion and the substantive content of employment contracts.[89] It requires protection against unfair dismissal and other capricious sanctions, particularly the replacement of 'employment-at-will' with specific reasons for dismissal (misconduct, redundancy, *etc*).[90] It also suggests protection against discrimination, and the safeguarding of worker privacy.[91]

Separately, the decommodification of labour gives new impetus to the labour law protection for freedom of association and collective bargaining. The preference for worker voice expressed earlier in the discussion of the collective *laissez-faire* model, in the form of trade

[85] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 129, 140.
[86] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 129-30.
[87] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 41-43.
[88] The normative underpinnings of fair procedures at work will be returned to in Chapter 7.
[89] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 123.
[90] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 65-66.
[91] See further discussion in Chapters 9 and 10.

union activity or other forms of co-determination, is desirable not merely for its instrumental benefits in negotiating material protections for workers, but intrinsically as an expression of the agency of workers.[92]

The most expansive versions of the dignitarian strand of labour law integrate labour law into theories of human capabilities,[93] further broadening the range of interests labour law is supposed to protect, and the modes by which it should do so – for example, lifelong education of workers to develop their 'human capital'.[94] It is beyond the scope of this thesis to examine every kind of human interest at stake in the workplace.[95] It is enough to note here that theories which emerge in the dignitarian strand are united in drawing attention to the psychological and interpersonal aspects of the labour relationship. These help us understand why the undeniable absolute improvement in material standards for working people over the past century is not enough to satisfy 'the straining of the spirit of man to be free'.[96] A capitalist enterprise cannot be allowed to treat labour as a mere factor of production (albeit a more expensive one, once the welfarists have had their say), nor to offer 'humans as a service'.[97] Decisions made about workers must accord them suitable respect and esteem, and reflect their nature as rational agents, and labour laws must protect workers in these ways too. Understanding that labour is not a commodity, but rather inseparable from working *people*, leads towards a vision of labour law that recognises workers' agency.

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[92] See Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 110; Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 69. This will be the subject of further discussion in Chapter 6.

[93] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8; Brian Langille, 'Labour Law's Theory of Justice' in the same volume, ch 7; Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford University Press 2019).

[94] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 112ff.

[95] There is a substantial body of literature that deals with the value of work to individuals: see, for example, James Nickel, 'Is There a Human Right to Employment?' (1978-1979) X Philosophical Forum 149; Guy Mundlak, 'The Right to Work - The Value of Work', in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007); Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015).

[96] Tony Topham, 'New Types of Bargaining' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 133.

[97] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018), citing a quote from Amazon founder and CEO Jeff Bezos (2006).

Syndicalism[98]

The claim for worker agency can be made in a weak or a strong form. The weak form is essentially the dignitarian view above, that humans are rational beings and as such must be allowed express their views and bring their interests to bear on decisions about them, if those decisions are to show them appropriate respect.[99] The syndicalist view advances a stronger claim to worker control over the productive process. The syndicalist strand of labour scholarship, long neglected but undergoing a recent revival, argues for a spectrum of control mechanisms, from consultation and collective bargaining by trade unions, through works councils, worker representation on company boards, and other forms of co-determination, to workplace democracy.

There is undeniably a 'long history in the Labour Movement' of aspirations towards 'industrial democracy' or to 'seize the means of production'.[100] Coates argues the only way to escape from 'wage slavery' is for workers themselves to control the productive process. Fudge points out that inequality of bargaining power only became a central concern of labour law in the postwar period, that until then its goal was worker participation in the management of production.[101] Blackett argues this is necessary to resist commodification of labour,[102] and republican political theory in particular has always thought of employees as dependent, subordinate, and therefore 'unfree' – more like slaves than citizens.[103] Dukes

[98] This term is borrowed from Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 16.
[99] See for discussion Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).
[100] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 64; see also Sidney Webb and Beatrice Webb, *Industrial Democracy* (2nd edn, Longmans, Green 1920). Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, 'Introduction: Exploring Autonomy' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 16 recognise that 'there are older constitutional currents in labour law that also align with universal values, such as industrial democracy or the dignity of labour. It is perhaps fair to say these were eclipsed… as scholars marvelled at the virtue of an organic system of voluntary collective bargaining that owed more to the practical activities of working people than the ethical reflections of philosophers.'
[101] Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8, 122.
[102] Adelle Blackett, 'Emancipation in the Idea of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 25, 421; see also Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 8.
[103] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999); Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232, 252; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 52, and *Private Government* (Princeton University Press 2017)

ties this explicitly to the historical development of labour law, particularly in Continental Europe: 'It is for this reason that the role of labour law was not exhausted by rules directed at securing fair wages and working hours… It had also to provide a means of worker participation in government of the workplace'.[104] In this way, labour law acts as a 'constitution' for the workplace, a 'Magna Carta [for] the entire wage-earning class'[105] which allows labour to participate 'on a parity basis' with capital in decisions about production.[106]

As mentioned above, Anderson describes the capitalist firm as a form of 'private government' or 'dictatorship'.[107] By 'private' she does not mean 'private sector' as opposed to the state; rather, 'private' government is where those who make orders are unaccountable to the subjects of the orders, and the subjects have no say over the decisions that are made.[108] Crucially, Anderson and other writers in the syndicalist strand do not dispute that *some* authority is always needed in large capital-intensive productive processes – just that this authority ought to be *legitimate*.[109] Conditions for the legitimacy of authority will be discussed further in Chapters 6 and 7, but suffice for the moment to say that legitimacy is to be understood here along the lines explained by Pettit,[110] and in the context of the material cited above on non-domination. For Pettit, legitimacy is a question of how decisions are made and outcomes delivered, quite apart from the substantive 'justice' of those outcomes.[111] Legitimacy is a principle of 'vertical' relationships (in the sense of one who has authority to make decisions and one who is subject to those decisions),[112] that

xx, 4, 7-11, 14-15, 23, 25ff, 35, 57; Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548.

[104] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 18.

[105] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 19.

[106] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 33.

[107] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 37ff.

[108] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 41ff.

[109] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 50-52, 65, 68, 133; Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232, 238: 'the goal is not to reduce the existence of managerial authority, but only its arbitrary exercise.'

[110] Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 Current Legal Problems 59. In that paper, Pettit discusses justice and legitimacy in the context of the state, but the principles remain instructive. See also John Gardner, 'Justification under Authority' (2010) 23 Canadian Journal of Law and Jurisprudence 71.

[111] Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 Current Legal Problems 59, 60.

[112] Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 Current Legal Problems 59, 60-61.

imposes '*pro tanto* moral obligations' to obey the authority.[113] In the absence of legitimacy, there is no real normative obligation to obey, nor real moral right to command. Foreshadowing some of the discussion in Chapter 5, Hseih rejects the idea that mere consent ('submission' to the contract of employment, as Kahn-Freund described it)[114] can legitimate authority.[115] Authority is only legitimate when it is obliged to track the interests of the subject.[116]

In a similar vein, Anderson considers the question of legitimacy of the bargain itself to supersede discussion of inequality of bargaining power: 'The fundamental normative issues concerning [work] do not lie in arguments about the voluntariness of the labour contract… [but] the legitimate form of government of productive enterprises.'[117] Anderson notes that '[j]ust because workplace governance requires a hierarchy of offices does not mean that officeholders must be unaccountable to the governed.'[118] Like Coates, she considers the establishment of worker control to be much more important than bread-and-roses material provision, arguing that from the Industrial Revolution up to the mid-twentieth century, labour movements understood that their material conditions were only *derivative* from control of the productive process.[119] However, workers also want control for intrinsic reasons of expressing their agency, not merely as means to the end of paying themselves higher wages.[120] This point highlights an important parallel between dignitarian and syndicalist views of labour law: worker control, like fair procedures and voice, is both

[113] Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 Current Legal Problems 59, 63ff.
[114] Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18; see also Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 51ff.
[115] Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115, 132; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 68.
[116] Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115, 123ff; Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33(3) International Journal of Comparative Labour Law and Industrial Relations 365, 375-76.
[117] Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 50. Likewise, Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 7, 140-42 argues that the 'democratic deficit' at work is much more troubling than negative outcomes from inequality of bargaining power; see also Guy Davidov, 'Re-Matching Labour Laws with Their Purpose' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 11, 189.
[118] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 68.
[119] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 59-62.
[120] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 59.

instrumental to protective outcomes and inherently valuable for the recognition of worker agency.[121]

Anderson discusses three ways to make the private government of the workplace 'public' in the sense of accountable to workers: trade union bargaining, co-determination, and workplace democracy.[122] These are best understood as a spectrum of voice, influence and control. We can see that actual labour laws fall at various points along the spectrum: for example, the Collective Redundancies Directive provides for mandatory consultation with workers' representatives;[123] most countries in Europe provide for some level of worker representation on company boards of directors;[124] some jurisdictions provide for greater co-determination by means of works councils.[125]

The syndicalist strand is divided as to the appropriate level of accountability or control required for workplace governance to be legitimate: for example, Davies[126] and Jones[127] are broadly content with autonomous collective bargaining by trade unions, while other authors recognise this needs to be supported by robust strike action to be effective;[128] Hseih

[121] For many in the syndicalist tradition, 'workplace constitutionalism' in the form of legal rights against management are insufficient because although they might adequately protect workers' interests, they cannot fully legitimate authority in the workplace. That requires democratic accountability of managers and participation of workers in decision-making, or else firms are simply 'constitutional monarchies' (see Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232, 242-45, 248). However, Hsieh notes that legal rights for workers are still *necessary*, even under workplace democracy, if only to protect workers on the losing side of a majority vote.

[122] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 69-70; Although Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232, 233 defines workplace democracy as: 'A form of managerial organisation in which workers have control rights over the management of the firm', that definition is actually too broad, as it encompasses co-determination as well.

[123] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (as amended), article 2.

[124] These laws have been studied by the European Trade Union Institute: for more information, see <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2> accessed 10 September 2020.

[125] With Germany being the most famous example: see the Works Constitution Act 1952 (as amended). Co-determination through works councils is discussed in Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 70, 143; and Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 20ff. See also Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017).

[126] Paul Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 15.

[127] Jack Jones, 'Unions Today and Tomorrow' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967).

[128] Alan Bogg, 'Labour Law and Trade Unions: Autonomy and Betrayal' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 3, 101; Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester

wants workers to be able to *contest* managerial decisions rather than *control* production;[129] González-Ricoy argues for democratic elections of managers but not necessarily direct democracy in respect of all decisions;[130] Anderson prefers a co-determination model like the German system of works councils to full workplace democracy;[131] Dukes, drawing on Sinzheimer, argues for autonomous collective regulation of the economy by a 'mixed constitution'[132] of trade unions, works councils, individual employers and employers' representatives,[133] with the economy ultimately remaining capitalist in nature, if more democratic;[134] whereas Coates[135] and Topham[136] consider that *at the very least*, workers need to 'seize the means of production' to enjoy effective control at work. As Collins points out, whatever level of control is ultimately delivered, syndicalist labour law is involved in how firms operate – ground more typically covered by company law.[137] Essentially, syndicalists view the labour relationship as fundamentally about corporate governance.[138]

and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13. See also Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction' in the same volume, ch 1, 26.

[129] Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115, 138-39; see also Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151, 163; Einat Albin, 'Social Inclusion for Labour Law: Meeting Particular Scales of Justice' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 16, 293.

[130] Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232, 238, 244ff, 249-51.

[131] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 70, 130, 143, and 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 61.

[132] To borrow an analogy from Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 68 (although she does not subscribe to the same model as Dukes).

[133] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 4, 13, 20ff, 33-35, 125.

[134] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 4.

[135] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967). Indeed, at 65-67, Coates argues there is an 'element of make-believe' to the 'fog of a vast ballyhoo of cynical devices for "participation" or "involvement"' short of full worker control over production.

[136] Tony Topham, 'New Types of Bargaining' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 141.

[137] Hugh Collins, 'Labour Law as a Vocation' (1989) 105(Jul) Law Quarterly Review 468, 481. This parallels the recent trend in company law literature in respect of 'stakeholder governance': see, for example, Cynthia A Williams, 'Corporate Social Responsibility and Corporate Governance', in Jeffrey N Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press 2018).

[138] This means when the state 'intervenes' in the labour relationship it is more like setting the rules of the game in advance than it is 'invading the pitch' during a game – see Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 51, 64, and *Private Government* (Princeton University Press 2017) 143. See also Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 118ff.

Ultimately, for all this diversity of emphasis, syndicalist labour law is a challenge to capitalist modes of production that equate ownership of the means of production with exclusive managerial control over the productive process and other associated decision-making. Syndicalists are unanimous in the belief that workers have standing, have some claim, to rights of participation and influence in decisions made that affect their working lives and the conditions thereof. They want to drive a wedge between ownership of commodities and power over people. It should be pointed out that some authors in the syndicalist strand focus on workplace democracy *stricto sensu* – control by a particular group of workers of the particular business for which they work. Others (Dukes being the prime example) focus more on administration of the *economy* (or at least sectors thereof) by workers' and employers' collective organisations, or other institutional frameworks that extend beyond individual firms.[139] Coates highlights practical reasons to prefer the latter:

> The real unit… to democratise is not… the factory. It is the economy… To argue for democratic control of the economy is not to argue against factory democracy… But to establish norms of workplace democracy in an uncontrolled and undemocratic economy is to conduct a permanent Canute-like dialogue with the ocean of the market.[140]

In other words, if the detractors of workplace democracy are correct that worker-run firms will be less efficient and less profitable (although the evidence is mixed on this point),[141] then any individual firms with workplace democracy will be undercut, swallowed up or otherwise driven out of the market by undemocratic firms. Therefore, a model closer to Dukes' administration of the economy at large is likely to be more successful at securing worker voice in the long-term.[142] Dukes, following Sinzheimer, argues this can be accomplished by means of a 'labour constitution' that complements the 'political constitution' which establishes the state and its political organs, performing a similar

[139] See also Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548.
[140] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 68.
[141] See Tyler Cowen, 'Work Isn't So Bad After All' in Elizabeth Anderson, *Private Government* (Princeton University Press 2017) ch 6, 116 and Anderson's response in the same volume 142, and sources cited therein.
[142] Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548, 561 also makes the point that worker co-operatives disenfranchise other actors affected by decisions over production, like consumers.

constitutive and power-distributing function for otherwise self-sustaining and autonomous economic actors.[143] More will be said on this in Chapter 6.

The more one thinks about workers running the *economy* rather than the *workplace*, the more one is in the realm of political activity.[144] The division between the 'political' and 'economic' constitutions drawn by Sinzheimer and Dukes might work on an institutional level, but is theoretically unsustainable. Political actors across the spectrum have long recognised that economic conditions are frequently the most important motivator for voters' political activity: 'It's the economy, stupid.'[145] That suggests that the syndicalist goal of sustainable worker control over economic life is more likely to be realised by working-class political action than it is by workplace democracy.[146] In a nod to the efficiency theorists above, it seems plausible that centralised, consistent state action in the regulation of working life is likely to be more efficient than *ad hoc* decision-making by autonomous economic actors, accounting for the non-market value of higher standards of worker welfare and dignity.

Political participation

As it happens, the labour movement has always known that its goals are best advanced through democratic political participation – *ie*, by getting the power of the state on its side in the struggle against capital.[147] Even the 'Bread and Roses' strike had as its aim the extension of the franchise to working-class women:

> What the woman who labors wants is the right to live, not simply exist – the right to life as the rich woman has the right to life, and the sun and music and art… The

[143] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) generally; see in particular 18: 'It was for this reason that the role of labour law was not exhausted by rules directed at securing fair wages and working hours… It had also to provide a means of worker participation in the government of the workplace and of the economy as a whole.'
[144] Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548, 559ff.
[145] James Carville (1992), as part of the US presidential campaign of Bill Clinton of that year.
[146] Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548, 558ff.
[147] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 189.

> worker must have bread, but she must have roses, too. Help, you women of privilege, *give her the ballot to fight with*.[148]

A recent strand of labour scholarship has also revived what Bogg *et al* call the 'older constitutional currents'[149] of the discipline, to the effect that labour has always had political aspirations which find their expression in labour law. This strand fully embraces the political conflicts mentioned above, recognising extant labour laws as a set of political concessions to pacify militant labour organisations and reformist political movements. The difference between this strand and the syndicalist tradition is that the latter focused on worker control over the workplace; the political strand aspires to worker control of the state.[150]

Labour republicanism

According to Zatz, there is:

> …a robust tradition of framing labour rights in terms of access to full citizenship [and] workers' claims to community membership… The historical record… strongly supports the view that labour rights always have been intertwined with broader views of workers' place in society.[151]

The political strand of labour law normativity finds its inspiration in this 'unabashed, though often fraught, linkage between work and citizenship'.[152] As we saw with the 'Bread and Roses' speech above, a significant amount of labour activism (including industrial action) has historically been directed at securing political rights. Arendt goes so far as to say, 'The turning point in the history of labour came with the abolition of property

[148] Rose Schneiderman, in a speech delivered in 1912; reproduced in Sarah Eisenstein, *Give Us Bread But Give Us Roses: Working Women's Consciousness in the United States, 1890 to the First World War* (Routledge 1983) 32 (emphasis added).
[149] Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 16.
[150] See Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 100.
[151] Noah D Zatz 'Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 9, 251.
[152] Noah D Zatz 'Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 9, 255.

qualifications for the right to vote';[153] the worker's goal was to be 'admitted to the public realm and fully emancipated as a citizen'.[154]

Labour activism is as much concerned with 'the status of the workers in society at large' as it is with material conditions or even the interpersonal and institutional relationships between workers and management.[155] The working class needs to be 'accepted into political citizenship'[156] to have a 'legitimate political existence'.[157] Some of this falls into the tradition of 'labour republicanism', analysed extensively by Gourevitch.[158] He argues: 'There is an inevitable and irresistible conflict between ['wage slavery'] and the republican system of government'[159] and that the process of building a constitutional democracy of equal citizens, begun in the abolition of chattel slavery, continues in the integration of workers into the political community.[160] Throughout the nineteenth and early twentieth centuries, trade unions were among the strongest advocates for universal suffrage, freedom of expression, public education, and other rights of citizenship.[161]

Lane argues that only politically active workers are ever 'co-opted into citizenship' in this way.[162] As such, labour law must help build the 'political consciousness' of workers: in this, trade unions in particular play a 'preparatory political role'.[163] Therefore, the disjunction pointed out above between syndicalism and the political strand should not be overstated: both are grounded in resolutely democratic and egalitarian instincts, both aspire

[153] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 217.
[154] Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 217.
[155] Paul Foot, 'The Seamen's Struggle' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 188.
[156] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 277.
[157] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 276.
[158] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) generally, and in particular 7ff, ch 4.
[159] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 6.
[160] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 68-69.
[161] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 101ff; Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 215ff; Gillian Lester, 'Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 20; Blackett in the same volume, ch 25, 431; Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) chs 3, 5 and 8; Jack Jones, 'Unions Today and Tomorrow' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967); Victor Allen, 'The Paradox of Militancy' in the same volume, 244.
[162] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 68.
[163] Perry Anderson, 'The Limits and Possibilities of Trade Union Action' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 247.

to worker 'self-determination',[164] and the participatory 'habits' picked up in trade union activity or workplace democracy are widely considered to help citizens perform the same role in political life.[165] By participating in labour activism, trade union activity, and workplace consultative and co-determinative institutions, workers develop political consciousness and the frame of mind necessary for 'contestatory citizenship'.[166]

Notwithstanding the proud tradition of explicitly political labour activism, we may still be left wondering why exactly the labour movement cares about 'citizenship'. After all, Jones reminds us that for most workers, a trade union is like 'a slot machine. You put your money in and see what comes out the bottom.'[167] For many workers, union membership is purely transactional and instrumental in the pursuit of material gains. The same is true for labour law writ large: workers who need bread and roses may have little time for broader political goals or democratic participation. The next chapter will show how an important aspect of citizenship is that participation is rendered worthwhile for citizens by the guarantee of certain rights. For the moment, it will serve to highlight at least three reasons to think that the labour movement's concern for the building of citizenship is more than 'pie in the sky'.[168]

First, as indicated above, the labour movement has long known that control over economic conditions requires control over the state – or at least, participation in governance.[169] 'Economic' problems are only superficially so – they are often really political questions, with political answers.[170] Political participation is therefore instrumental to better material conditions and fairer treatment. This is why some trade unions maintain political funds,[171] or are affiliated with political parties; the political activity of trade unions will be

[164] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015).
[165] Perry Anderson, 'The Limits and Possibilities of Trade Union Action' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 267; Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 114-15; Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151, 161-62.
[166] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13.
[167] Jack Jones, 'Unions Today and Tomorrow' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 123.
[168] Joe Hill, 'The Preacher and the Slave' (1911).
[169] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 101.
[170] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 27.
[171] In the Irish context, regulated by the Trade Union Act 1913, section 3.

considered in Chapter 6. Second, the sort of membership of a community entailed by citizenship is one of 'democratic equality'[172] that gives individuals a sense of internal self-respect, and external validation of their status in the community. The next chapter will elaborate further on these conditions. Third, workers, like all people, value their own agency. We have seen above how respect for worker agency in the workplace is a key concern of the dignitarian and syndicalist strands of labour law – the political strand takes the same agency in the broader context of the political economy. Although the next chapter will caution against fixating on 'politics for politics' sake', it is certainly the case that the very feeling of political empowerment is an inherent benefit for workers. This is why Lane celebrates how, at times of great labour agitation in history, 'working men were in rags by the thousands… [but] you would see them in groups discussing the great doctrines of political justice…'[173]

Of course, just because the labour movement advocates for something does not automatically make that part of labour *law*. Labour activists generally support policies as varied as rent control, universal healthcare, various foreign policy and humanitarian priorities, tax reform, *etc*.[174] However, there is good reason to think the labour movement has traditionally considered that at least some of their rights of citizenship would be protected through labour law. One of the reasons classical republicans sought to exclude the working class from political life is the view that workers were too dependent on their employers, and would be subject to undue pressure to conform their political activity to the latter's wishes rather than bring their own judgment to bear:[175] that a worker's 'opinions are not his own but belong to his master'.[176] As Chapter 5 will analyse in more detail, a constitutional democracy depends on workers having sufficient insulation from this sort of malign influence by bosses. Suffice for the moment to point out there are two elements to this: one, the worker must be protected from direct control by his boss in certain areas of

[172] Elizabeth Anderson, 'What is the Point of Equality?' (1999) 109(2) Ethics 287, and 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48.
[173] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 73.
[174] For a sample, see <https://www.siptu.ie/campaigns/>; <https://www.ictu.ie/globalsolidarity>; <https://www.ictu.ie/press/2020/09/15/statement-on-moria-refugee-camp-in-greece/> all accessed 16 September 2020.
[175] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 6, 68, 112-15; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 158ff; Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.
[176] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 115.

personal and political choice; two, he must live sufficiently comfortably and have enough leisure time that he can think about political issues and engage in political activity. Indeed, part of the motivation for limiting working hours has historically been to free up workers to participate in political and community life.[177]

'Labour built this republic, and labour shall rule it'[178]

We can see that the instrumentality in fact pushes in both directions: workers want political influence so they can achieve protective legislation; but they also want protection so they can function as citizens. In light of 'slot machine' attitude referred to above, it is worth focusing more on the first claim, that the political rights of citizenship, and the control over state policy and laws these facilitate, are useful to workers in their pursuit of decent and dignified working lives.[179] The history of the labour movement records how workers seek to use their political power to win economic and other benefits and legal protection of their interests: 'Key to the making of labour law was the participation by workers in the public sphere in order to improve their situation in the economic sphere.'[180] It was argued above that workers' economic conditions are a *function* of their political status, that economic problems demand political solutions.[181] The implication here is that politically-active workers will vote or lobby for regulation and other state intervention in the economy that favour their interests.[182] Javillier argues: 'Through legislation, the workers could oppose the power of the employer and impose their views', or at least 'establish a more favourable balance of power on the workers' side'.[183] Conversely, preferences in the field of economic policy like worker-protective legislation or even nationalisation of industries are not valued

[177] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 144-46, 156ff.
[178] Sign at the first US Labour Day Parade in New York City (1882); see Krystal Ball, 'Rising: 65% of Americans Approve of Labor Unions as Economy Implodes' *The Hill* (Washington DC, 8 September 2020) <https://www.youtube.com/watch?v=tdJhuv3idm8> accessed 15 September 2020.
[179] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 145.
[180] Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 2, 37.
[181] Victor Allen, 'The Paradox of Militancy' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 258: the problems workers face 'can only be solved by long-term political action'.
[182] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 195: 'workers ought to be in a position to argue for the type of economic order… which will better protect their interests'.
[183] Jean-Claude Javillier, 'The Employer and the Worker: The Need for a Comparative and International Perspective' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) ch 17, 361.

in themselves, but as means to the end of greater *democratic* control by workers over their own lives, *through* the constitutional state over which their political rights give them an appropriate level of influence.[184]

The doctrine of collective *laissez-faire* says that the best way for workers to gain power and beneficial outcomes is for the state to keep well out of labour relations, leaving it to the 'Twin Giants'[185] of labour and capital to bargain autonomously; as Wedderburn put it, 'Most workers want nothing more of the law than that it should leave them alone.'[186] As explained above, however, this optimism was unable to survive the decline of organised labour and the rise of globalised capital in the late twentieth century. Even at the height of collective *laissez-faire* in the UK, Anderson presciently observed: 'The balance of power in any capitalist enterprise is so unequal that – without collateral intervention by [the] state – no union can hope to wrest major management prerogatives from the employer.'[187] Workers always knew they would need the resources of the state on their side if they were to achieve significant, lasting improvement in their lives – which is why so much of the early labour movement was devoted to explicitly political goals. The demand for universal suffrage of the 'Bread and Roses' strikers is just one example of the long efforts of organised labour to democratise the state, to make it accountable to workers as citizens, so that its political and legal power might serve their interests.[188]

If workers and their advocates have sometimes lost sight of these political aspirations, their antagonists never have. A range of scholars attest to the fact that labour activism has always been considered highly political action by those who would resist its claims, precisely because capital understands the danger to its interests should workers have access to the resources of the state. Strikes have been condemned throughout history as a 'challenge [to]

[184] Ken Coates, 'Wage Slaves' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 68-69; Tony Topham, 'New Types of Bargaining' in the same volume 137ff; Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 111, 196.
[185] Philip Toynbee, 'The Language of Inequality' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 95ff.
[186] KW Wedderburn, *The Worker and the Law* (1st edn, Penguin 1965) 9.
[187] Perry Anderson, 'The Limits and Possibilities of Trade Union Action' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 268-69.
[188] In this way, labour law functions as a 'constitutional' form of anti-power, discussed by Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 67.

the constitution';[189] trade unions as 'the enemy within'.[190] Governments have rarely been shy to take a side in industrial disputes, often violently suppressing workers' organisations.[191] According to Foot, it is generally the *state* which brings 'politics, centrally and unequivocally, into industrial relations. [Workers] can no longer remain apolitical… In the interests of their own survival they [must] become political.'[192] Workers must engage with the political machinery of the state as citizens to exercise sufficient control that the question 'which side are you on?' is answered in their favour.

Thus Hyde characterises labour law as a 'ritual [of] concession' to working class political pressure,[193] an effort by panicked elites to quell industrial and political unrest and pacify the labour movement while ultimately also preserving their own interests.[194] Any individual labour law is more frequently the outcome of political power struggles than consensus or reasoned deliberation.[195] If this is so, then it is even more important that labour scholars be mindful of the political aspirations latent in the field: political activity by workers will be absolutely necessary to secure labour law protections. Furthermore, understanding labour law as a *concession* makes it all the more important to focus on the original political demands. As any trade union negotiator will tell you, the lower a movement sets its sights, the less it will end up with. Labour law only 'works' when it is 'something worth settling for'.[196]

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[189] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 16, 37ff, 92ff, 101, 122; see also Paul Foot, 'The Seamen's Struggle' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 186-87.
[190] Margaret Thatcher (1984).
[191] See for some of regrettably many examples William A Pelz, *A People's History of Modern Europe* (Pluto Press 2016); Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 3-4; Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) generally; Paul Foot, 'The Seamen's Struggle' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967); Michael Frayn, 'A Perfect Strike' in the same volume; François Bédarida, *A Social History of England 1851-1990* (AS Forster and Jeffrey Hodgkinson tr, 2nd edn, Routledge 1990).
[192] Paul Foot, 'The Seamen's Struggle' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 209; see also Bob Rowthorn, 'We Haven't Got Enough!' in the same volume 223.
[193] Alan Hyde, 'A Theory of Labor Legislation' (1990) 38 Buffalo Law Review 383, 384, 432.
[194] Alan Hyde, 'A Theory of Labor Legislation' (1990) 38 Buffalo Law Review 383, 440, and 'What is Labour Law?' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) 52.
[195] Cristina Inversi, Lucy Ann Buckley and Tony Dundon, 'An Analytical Framework for Employment Regulation: Investigating the Regulatory Space' (2017) 39(3) Employee Relations 291, 309.
[196] Alan Hyde, 'A Theory of Labor Legislation' (1990) 38 Buffalo Law Review 383, 449.

Summary

To summarise, labour law plays a role in (a) allowing workers to play a participatory role in political and civic-social life, as full, equal members of the community (citizens); (b) putting the resources of the state at the disposal of workers in their struggle against capital to secure the material and dignitarian benefits referred to above; and (c) structuring the economy, distributing power and those material and dignitarian benefits throughout the community on terms which take into account the interests of workers as citizens and are subject to their political control. In this way, labour law is part of a broader vision of political economy. It allows workers to overcome and reform a society based on class, establishing and maintaining a society based on citizenship in its place.

None of this is to say that labour law in this political strand is necessarily 'one long exercise in Marxist ventriloquism'.[197] Yes, many scholars (to say nothing of the labour organisations and movements themselves) in this field are socialist or social-democratic,[198] but there is much writing in this strand from a liberal or republican perspective, which would prefer to see the means of production dispersed throughout the community in a form of 'property-owning democracy',[199] or thinks workers' interests are best served not by protective labour law but by costless exit and free competition.[200] In this respect, the political strand can be both more and less radical than the syndicalist strand: more, because the aspiration is towards political participation in and control over the *state* rather than merely the *workplace*, but also less because it by no means demands 'all power to the Soviets', just participation in ordinary electoral democracy on equal terms.

[197] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 185.
[198] This author included, in broad agreement with Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548.
[199] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3; see also Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115; Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151, 160ff; and Tom O'Shea, 'Socialist Republicanism' (2020) 48(5) Political Theory 548, 561ff.
[200] Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017).

Conclusion

The goal of this chapter was to locate within the pluralist foundations of labour law, a normative aspiration capable of justifying constitutional labour law. Bargaining over bread and roses has only ever been part of labour law's story. There are diverse narratives for this discipline, including 'old constitutional currents' that are explicitly concerned with the emancipation of workers from the domination of bosses, worker control over their own lives and their participation in civil society on equal terms with their fellow citizens. Labour law is and always has been a profoundly political project, a challenge to the way societies and economies are run; even when workers themselves have failed to appreciate this, labour's class antagonists never have.

As a political project, labour law is also a constitutional project, for it aims to facilitate participation in the government of the state, structure power in society, and integrate 'private government' into the state and its democratic decision-making structures. It aims to put the power and resources of the state at the disposal of workers in their struggle against capital. To do so, labour law needs to protect workers as human beings with dignity and agency, but also as *citizens* with standing and legitimate claims in the political arena of a constitutional democracy.

This thesis now turns to elaborating the meaning of this concept of citizenship. The danger posed by traditional hierarchical employment relations to democratic citizenship and constitutional democracy itself will be the subject of Chapter 5. That will lead us on to how labour law, specifically constitutional labour law, protects workers as citizens.

CHAPTER 4:
CITIZENSHIP

Introduction

Chapter 2 highlighted the deficiencies of the 'labour rights are human rights' and 'human rights at work' models of constitutional labour law, and some broader problems with enforcing human rights in a private employment relationship that any satisfactory theory must overcome. Chapter 3 demonstrated there are pluralist normative foundations of labour law, in which can be found the aspirations of workers towards citizenship. This chapter begins the work of developing an alternative theory to justify constitutional labour law, based around the need to protect workers as citizens within a constitutional democracy. The next chapter will argue that citizenship, understood in the way explained in this chapter, justifies intervention by constitutional courts in the labour relationship on the basis of constitutional norms – *ie*, justifies constitutional labour law. What this means in practical and doctrinal terms is then the subject of Part III.

This chapter will proceed as follows: first, it addresses two preliminary objections to a reliance on the concept of 'citizenship' for the purposes of this thesis: the difficulty of identifying a single notion of citizen that transcends particular jurisdictions, and the concern that it excludes, for example, immigrant workers. Next, the chapter explores citizenship as participation in the state; then it discusses citizenship as a set of membership-based rights; and finally considers a republican perspective that embraces citizenship as a social status of 'non-domination'. Although some writers consider these to be 'rival' accounts of citizenship,[1] they are better considered as elements in a thorough understanding of citizenship, each of which assumes greater or lesser importance in a given context. As will be seen in the next chapter, non-domination is particularly important for understanding the 'horizontal' aspect of how citizens relate to one another. The spirit of mutual citizenship is incompatible with open-ended institutionalised authority of one citizen over another. In order to live together in a robust constitutional democracy, individuals must view each other as *concitoyens*, not as 'master and servant'.

[1] See, for example, NW Barber, *The Constitutional State* (Oxford University Press 2010) 50; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 285.

A model citizen?

The concept of citizenship is both a 'status-concept' and a normative ideal. Taking the former of these: to be a citizen is to be endowed with a certain status in society, which comes with an associated 'bundle of rights and duties'.[2] Though everyone who is a 'citizen' of a given state at a given time holds the same bundle,[3] the substantive content of the bundle varies from state to state and across time. A citizen of the Roman Empire did not have the exact same substantive rights and duties as a citizen of twenty-first-century Ireland, and nor necessarily does a citizen of twenty-first-century France. That is not to say that the content of citizenship is infinitely variable, but that citizenship is intrinsically bound up with the nature of the state of which one is a citizen.

The problem this poses for the present thesis is that it suggests citizenship is too parochially-variable a concept to be of any real normative value. To the extent that any state is different from another (which every state is to *some* extent), the content of citizenship status might also be different. To be useful, the concept of citizenship relied on must be capable of describing more than merely the contingent political and legal arrangements of one particular state which calls the people who live there 'citizens': it must be a convincing description of political and legal practices more generally. Equally, it must have normative features as well as descriptive ones. The model of citizenship developed must be an exercise in what Barber calls 'interpretive constitutional theory'.[4] As explained in Chapter 1, Barber says that a 'good interpretation of a phenomenon is one which illuminates its important features, explaining the part it plays within the life of a community'.[5] This requires a certain abstraction from currently prevailing practices, but not so far removed as to lose touch with embedded social reality: 'interpretations… must be sufficiently close to the popular understanding of the phenomena to be intelligible'.[6] The concept need not be *universally* normative (it might still be relatively parochial), but it must have some normative content that is capable of transcending particular social norms of a

[2] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18.
[3] Ranier Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8(2) Theoretical Inquiries in Law 453; Pavlos Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 778; Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18.
[4] NW Barber, *The Constitutional State* (Oxford University Press 2010) 2ff.
[5] NW Barber, *The Constitutional State* (Oxford University Press 2010) 4.
[6] NW Barber, *The Constitutional State* (Oxford University Press 2010) 7.

given society, in order to function as a normative ideal – which is what we want citizenship to do in this thesis.

This thesis draws primarily on Irish and European legal doctrine to construct its picture of constitutional labour law. More generally, it is grounded in the constitutional, political and social traditions of modern Western Europe.[7] Perhaps this is indeed too 'parochial' an understanding to be of much normative guidance outside this tradition;[8] but as Barber says, any exercise in interpretive theory must be grounded in *some* relatively settled set of social practices and beliefs, or what Fish calls an 'interpretive community'.[9] In other words, the justification developed here for constitutional labour law is based on normative premises that have force 'in societies like ours'.[10] The content of citizenship status is broadly stable across (at least) the Member States of the European Union, in no small part because those states have all signed up to shared constitutional arrangements that require certain rights be afforded to their citizens, and that they treat each others' citizens in certain ways.[11] This makes it possible to speak of a 'European model' of citizenship,[12] in states which all have democratic political institutions, broadly liberal, secular values, commitment to the rule of law and judicial enforcement of a common set of human rights, generally peaceful and co-operative participation in international relations and institutions, and mixed market economies with fairly substantial state involvement and a comprehensive social welfare

[7] As set out in the Sources section of Chapter 1, the legal material that will be relied on is fairly selective within this tradition. There is no engagement with 'civilian' legal material. However, the sources used for the theoretical sections of this thesis are not inherently 'common-law' biased (though inevitably they are primarily those published in the English language, and therefore *may* be more likely to engage with Anglophone legal material).

[8] Even if this tradition has wider and deeper influence than we might first realise: see Tom Holland, *Dominion* (Little, Brown 2019).

[9] Stanley Fish, *Is There a Text in This Class?* (Harvard University Press 1980) 147, 'Fish v Fiss' (1984) 5(1) Mississippi College Law Review 1, and 'Almost Pragmatism: the Jurisprudence of Richard Posner, Richard Rorty and Ronald Dworkin' in *There's No Such Thing as Free Speech (and It's a Good Thing Too)* (Oxford University Press 1994) ch 13.

[10] NW Barber, *The Constitutional State* (Oxford University Press 2010) 55.

[11] For example, the European Convention on Human Rights, the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights of the European Union.

[12] The terminology is borrowed from Albert Weale, 'Citizenship in Europe and the Logic of Two-Level Political Contracts' (2014) 15 German Law Journal 867; Augustín José Ménéndez, 'Which Citizenship? Whose Europe? The Many Paradoxes of European Citizenship' (2014) 15 German Law Journal 907, among others. Admittedly, this model is of extremely recent provenance in the political history of Europe: certainly only since the development of the welfare state in the mid-twentieth century, and arguably only since the decline of colonial empires and the creation of the Council of Europe and European Union – or indeed for much of the continent, the fall of the Iron Curtain. This is also not to deny that many other countries beyond Europe share a similar model, but it is at least arguable this has been predominantly under the influence of European-centric political thought: see Tom Holland, *Dominion* (Little, Brown 2019).

system.[13] Without in any way diminishing the value of distinct national constitutional, political and social traditions across Europe, it is unlikely that the sort of co-operation and integration we have seen over the past seventy years would have been sustainable without broad alignment in those traditions in many important respects. Therefore, there must be some model of citizenship in this tradition that can meaningfully be applied to various states.

Barber, obviously, writes about citizenship as an abstract concept in constitutional theory, notwithstanding that he builds in many things we would recognise as part of the 'European model' set out above, though he demurs from tying citizenship to the operation of social democratic welfare programmes.[14] Weale goes so far as to say that 'the European social model [is] a central element in any justifiable conception of citizenship'.[15] This thesis does not need to examine the role of a social welfare system; it certainly does not need to conclude, like Weale, that a comprehensive welfare system is a necessary condition for the legitimacy of the state and of a morally-defensible conception of citizenship.[16] It is not necessary to spell out all of what citizenship requires, to accept that the concept is capable of functioning as a normative standard or ideal, as opposed to merely a descriptive tag for the actual practices of one or more states.[17] All that is required is to say that (a) states can realise citizenship to greater or lesser degrees; (b) it is normatively desirable that they

[13] See for a broader discussion, Ingo Schmidt (ed), *The Three Worlds of Social Democracy* (Pluto Press 2016).
[14] NW Barber, *The Constitutional State* (Oxford University Press 2010) 51, although his discussion is nuanced: basic material needs (in particular food, healthcare and education) *must* be met in order for individuals to function as citizens so, ordinarily, the state will provide for these needs where individuals cannot meet their own. However, according to Barber, citizenship could still 'flourish' in circumstances where these needs are met by private organisations, whether 'charities or businesses'. Conversely, Marshall's model of citizenship is explicitly based around many of the civil rights and social protections which are associated with modern Western European political history. King and Waldron rely on this conception of citizenship to defend the welfare state from various neoliberal or libertarian efforts to undermine it; see Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415; see also Jeremy Waldron, 'Social citizenship and the defense of welfare provision' in *Liberal Rights* (Cambridge University Press 1994) ch 12.
[15] Albert Weale, 'Citizenship in Europe and the Logic of Two-Level Political Contracts' (2014) 15 German Law Journal 867, 869.
[16] Although that is in fact the author's view. It is beyond the scope of this thesis to elaborate on this position, but for discussion see Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1994) chs 10, 13 to the effect that the (poor) individual has no incentive to be loyal to the state and conduct himself as a citizen in the absence of welfare provision, and the state no corresponding right to demand his compliance with its laws. The author is also of the view that comprehensive social welfare is a necessary complement to protective labour laws and rights, but again it is beyond the scope of this thesis to elaborate on this point.
[17] See for discussion NW Barber, *The Constitutional State* (Oxford University Press 2010) ch 3, and *The Principles of Constitutionalism* (Oxford University Press 2018) 103ff; Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013); and the various contributors to the 2015 German Law Journal special edition on European citizenship.

pursue greater realisation; and (c) citizenship properly understood includes various important features, of which constitutional labour law is one. In other words, the model of citizenship developed here can function as a *normative* standard (within this constitutional tradition), that justifies constitutional labour law, whether or not it precisely *describes* citizenship in any given state or states.

Citizenship – an exclusionary concept?

The second concern is that citizenship is an exclusionary concept. As will be explored below, citizenship relates to membership of a community. Even its proponents admit that it divides people into in- and out-groups.[18] Indeed, Anderson argues that: 'The exclusion of migrants helps *define* the privileges and the limitations of citizenship'.[19]

States are territorially-bounded entities. If all persons who lived in a state were citizens, and all persons who lived elsewhere were not, and there was no movement nor interaction between the two groups, this might not necessarily pose any problems. But of course, human nature is such that we tend to move around a lot, and social, political and economic realities compel millions of people to move to states of which they are not citizens.[20] Of particular relevance for this thesis is that one very common reason for people to move to another state is to seek work. If the protection of human rights in the employment relationship depends on citizenship, there is the risk that many millions of non-citizen workers (who are often already the most vulnerable workers)[21] will be excluded from protection.[22] If true, that could represent a significant normative failure for the theory. This

[18] See, for example, Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335; NW Barber, *The Constitutional State* (Oxford University Press 2010) 31ff, 48ff; Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951).
[19] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 2 (emphasis original).
[20] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) chs 1 and 2.
[21] For discussion, see Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) Work, Employment and Society 300; Cathryn Costello and Mark Freedland, *Migrants at Work* (Oxford University Press 2014); Cathryn Costello, 'Migrants and Forced Labour: a Labour Law Response' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) ch 8.
[22] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 10, chs 4 and 8.

concern, however, is based on two misunderstandings: first, of the nature of citizenship, and second, of the claim this thesis is advancing.

In respect of the first, the discussion above highlighted why our use of concepts like 'citizen' cannot stray too far from popular usage of the term, or the theory will fail to have any traction in our society. However, that does not require us to accept that the common markers of citizenship, in popular imagination or in law, are indeed conceptually definitive.[23] We will see later in the discussion of participation that even the right to vote, often considered a hallmark of citizenship, is by no means exclusive to citizens, nor held by all citizens at all times.

Pettit, whose theory of citizenship as a status of being free from domination will be examined below, defined the citizen in the following terms:

> I take citizens in this discussion to comprise, not just citizens in the official sense, but all the more or less settled residents of a state who, being adult and able-minded, can play an informed role at any time in conceptualizing shared concerns and in shaping how the state acts in furthering those concerns.[24]

Another important insight from Pettit's work which will be returned to later is that citizenship is an ideal which can be attained to a greater or lesser degree.[25] On the one hand, Anderson explains how plenty of people who qualify as 'citizens' according to legal tests are not treated as full members of the community in the way that citizenship requires: they are 'internal Others'.[26] On the other hand, to the extent someone has legal standing or some measure of protection by state institutions, they are already some of the way along the path

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[23] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335.

[24] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 75. He goes on to acknowledge that: 'Special issues of justice and legitimacy arise with… those who are not permanent residents…'. Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 164 defines citizenship in similar terms: '…political equality should thus not be taken to protect the status of citizen in a formal sense but, rather, the politicising role of equally applicable fundamental rights in the public life of a community… Such a framework attaches to "citizenship" in a philosophical sense *qua* participation and public exchange…'.

[25] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 31-32; see also NW Barber, *The Constitutional State* (Oxford University Press 2010) 53.

[26] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 3ff.

to full citizenship.[27] Most states have some institutional mechanism for helping relatively settled resident non-citizens 'naturalise'.[28] Even Anderson acknowledges that '[d]ifferent groups and individuals can slip in and out of the community of value' that marks the boundary of citizenship.[29]

Indeed, the entire history of citizenship as a normative and legal concept is marked by its progressive expansion to those previously considered outsiders.[30] The group of people who count as citizens in most modern states has expanded over the course of the past two centuries to include women, ethnic minorities, and the working class.[31] Citizenship is a

[27] *Cf* Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415; Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335. For discussion of a critical time in the historical development of this principle, see EP Thompson, *Whigs and Hunters* (Penguin Books 1975), in particular 258ff.

[28] At least, most states in the tradition in which this thesis is located. See, for discussion: Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) ch 5; Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 334.

[29] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 6. Moreover, what citizenship means in any given context may vary: for example, plenty of the constitutional rights afforded to 'citizens' in the Irish constitution are available to migrants or even corporations. See, for example, *NVH v Minister for Justice and Equality* [2017] IESC 35; *Iarnród Éireann v Ireland* [1996] 3 IR 321. See also Ailbhe O'Neill, *Constitutional Rights of Companies* (Round Hall 2007). The author is grateful to Philip Gavin for raising this point; for more, see Philip Gavin, 'Jumping the Gun: Codifying the Duty to Consider the Interests of Creditors in the Companies Act 2014' (2021) 65(1) The Irish Jurist 138, 162-68.

[30] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.

[31] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415. Of course, this process was fraught with concerns of political elites for the stability of the state. Some of these issues will be discussed in the next chapter. On how early modern liberals broke with their republican heritage precisely because they feared the expansion of republican non-domination to women and the working class, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 48ff. It is worth observing that in an EU context there has been much hand-wringing over the extension of citizenship rights to second-country nationals – in particular access to social welfare systems. For discussion, see Emily Hancox, '*Elisabeta Dano, Florian Dano v Jobcenter Leipzig*' (2015) 29(1) Journal of Immigration, Asylum and Nationality Law 62; Matthew Evans, 'EU Migrants, Abuse, and Access to Welfare' (2015) 29(3) Journal of Immigration, Asylum and Nationality Law 273, in particular 277ff; Paul Stanley, 'Debunking the "Benefits Tourism" Myth' (2016) 160(3) Solicitors Journal 27; Steve Peers, 'Free Movement of EU Citizens: What Could Renegotiation of EU Membership Mean?' (2016) 30(1) Journal of Immigration, Asylum and Nationality Law 48. See also the restrictions on eligibility for social welfare benefits contained in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) ('Citizens' Rights Directive'). Although such material protections as citizenship tends to provide are very important to citizens, reducing the concept to this yields a profoundly limited understanding of citizenship: Dana Villa, *Public Freedom* (Princeton University Press 2008) 293ff. Moreover, in reality, 'EU citizens from other Member States use welfare benefits no more intensively than the host country's nationals' and 'benefits tourism' is simply not the problem some commentators make it out to be: see European Commission memo on free movement of

status that represents a certain kind of relationship with the state, and membership of a community. By its very definition, a community has members and non-members – but we can argue for more welcoming or expansive communities, without that representing a threat to the privileges associated with citizenship. Waldron explains:

> Above all, citizenship is understood to be pervasive. In principle, the expectation is that all or most of those who make a life in a given country will be its citizens… That citizenship is a high-status dignity does not mean it is the special right of a privileged few or even of a large privileged class in a society… Citizenship would not lose its value if everyone within the boundaries of a state were a citizen of that state…[32]

In other words, citizenship as a normative ideal does not necessarily match either colloquial or legal use of the term *at present*, and its values should animate us to reform popular attitudes and legal institutions to include more people *in future*.

The second misunderstanding is about the claim this thesis advances. The exclusionary concern arises if protection of human rights in employment is dependent on citizenship. Yes, this thesis *is* arguing that workers should enjoy human rights protection against their employers because they are citizens. But that can be interpreted two ways: the first, which gives rise to the exclusionary concern, is that therefore *only* citizens should enjoy human rights protection against their employers.[33] This takes the status of citizenship as given, and argues for an additional benefit to that status. The alternative reading is that *in order to be a citizen*, a worker must enjoy human rights protections against his employer. This still has the consequence that if we do not care about citizenship, we will not care about human rights in the workplace. However, it will be argued that a constitutional state is properly concerned with the *development* of citizenship among its resident population. It was highlighted earlier how citizenship operates as both a status and a normative standard or

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people (25 November 2013) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_1041> and the sources cited therein, accessed 6 July 2020.

[32] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 334-35.

[33] Making the protection of constitutional rights entirely consequent on legal citizenship status is broadly rejected in the modern West, at least in respect of some rights: see Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335; Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.1.27]ff.

ideal. Recognising citizenship as both an ideal and a status which ought properly to be pervasive, means a constitutional state can (and should) progressively realise the concept of citizenship. The next chapter will argue that part of this constitutional project will be the protection of human rights of workers by means of constitutional labour law. That is not to say that we cannot find additional arguments to support the kind of rights we will discuss later; some of these arguments were canvassed in Chapter 2. Rather, it is to say that any state that holds out its relationship with its population as one characterised by their status as citizens must, in order to live up to that standard, embrace constitutional labour law. The foregoing has already given an indication of the model of citizenship to be relied on in this and subsequent chapters. This chapter now turns to examine the important features, as Barber puts it, of citizenship.

Citizenship as political participation

Citizenship is often primarily conceived as a vertical relationship between citizen and state; more specifically, a particular kind of relationship which allows the citizen to 'participate in the government of the state'.[34] Of course, only a very small number of people in the state will ever be part of the 'government' in the strictest sense. For the overwhelming majority of people, the most obvious means of participating in government is by voting for politicians in elections. That voting is a hallmark of citizenship is testified by the fact that in many states, *only* citizens can vote in national elections.[35]

However, the right to vote is neither exhaustive of citizenship, nor necessarily confined to citizens.[36] Participation in government is clearly not limited to exercising the franchise; as

[34] NW Barber, *The Constitutional State* (Oxford University Press 2010) 49-50; Ranier Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8(2) Theoretical Inquiries in Law 453, 474 agrees: 'Political participation is the core of democratic citizenship.'

[35] Ranier Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15 German Law Journal 751, 758ff.

[36] Ranier Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8(2) Theoretical Inquiries in Law 453, 477. Moreover, not all citizens can vote – children, for example. Some states, like Ireland, restrict the franchise to those citizens who are resident in the state (and do not allow 'overseas' voting, except for diplomatic and military personnel stationed abroad). Some states also restrict the right to vote of citizens who are serving prison sentences. A blanket ban on prisoners voting was held to be a breach of Article 3 of Protocol 1 to the European Convention on Human Rights in *Hirst (no 2) v United Kingdom* Application no 74025/01; *Greens and MT v United Kingdom* Applications nos 60041/08 and 60054/08, among others. However, the Court accepted in *Hirst* that the right to vote is not absolute, and states may impose some restrictions, including on certain categories of prisoners. A compromise was subsequently reached with the UK government for a very limited extension of the franchise.

Dagger puts it, 'a true citizen will take an active part in public life, and this activity must involve more than an occasional trip to the polling place.'[37] Barber speaks of 'participation' in broader terms that include running for election, joining political parties[38] and other non-governmental organisations, and engaging in public political debate. Beyond these essentially electoral forms of participation, he also includes in his view of participation things like serving on juries and assisting police and other public officials in carrying out their functions. The converse, *challenging* administrative decisions through appeal or judicial review, also falls under participation in government. Waldron says:

> [I]n public law private parties confront state agencies with complaint about arbitrary impact. Now, when these confrontations take place, I want to say that the private interest present itself in the guise of the interest of a particular citizen… And that gives the private interest a public flavour of its own.[39]

Walsh says that insofar as it provides for participation by citizens in regulatory decisions, administrative law is an exercise in 'democratisation'.[40] Barber has written elsewhere that 'administrative law is… constitutive of citizenship'.[41] Certainly, much of what it means to be a citizen is revealed in one's interactions with the state and its officials: 'vertical' engagements with the institutions of the state, be they electoral or administrative.[42] However, Barber's understanding of participation is broad enough to suggest citizenship has a 'horizontal' element too. Participation in the running of the state is not confined to interactions between individuals and elected political representatives (the electoral dimension) or other state officials (the administrative dimension). Participation in *civil society* is also important:[43] for example, he includes within his understanding of 'participation in the government of the state' volunteering at a local after-school club or

[37] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 100; see also ch 9.
[38] For more on what Baber considers the 'indispensability' of political parties, see NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 166ff. Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) takes an altogether more sceptical view of political parties and electoral politics, favouring instead trade unions and direct action.
[39] Jeremy Waldron, 'Public Rule of Law' (2014) New York University Public Law & Legal Theory Research Paper Series, Working Paper no 14-41, 5.
[40] Rachael Walsh, 'The Evolving Relationship Between Property and Participation in English Planning Law' in Nick Hopkins (ed), *Modern Studies in Property Law Volume 7* (Hart Publishing 2013) ch 13, 264, 272.
[41] NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 103.
[42] For discussion, see Paul Gowder, 'The Rule of Law and Equality' (2013) 32(5) Law and Philosophy 565.
[43] Later chapters will discuss the relevance of participation in the employment relationship in particular.

hospital.[44] In later work, Barber even argues that participation in civil society is more important than political participation.[45]

Villa criticises the very idea of a distinction between political participation and participation in civil society.[46] He argues that citizenship is a mindset, that democratic politics depend on people 'cultivat[ing] the habits and attitudes necessary to the formation of energetic and self-reliant citizens, rather than docile subjects'.[47] This mindset is acquired and developed only through 'learn[ing] the art of association', by engagement in civil society.[48] To foreshadow some of the discussion to come, Villa observes that 'power's actual workings do not respect the boundary between public and private.'[49] To shake off the tendency towards docility[50] and develop the mindset and habits necessary to participate in 'public' governance, the citizen must develop his 'resistance to control' at the level of ostensibly 'private' institutions like the workplace.[51]

Dagger highlights how participation in both social and political life builds trust in institutions and between citizens themselves, and thus facilitates co-operation among citizens for the common good.[52] Conversely, the consequence of people being mere 'consumers' of state services or other political outcomes rather than (participatory) 'citizens' is 'a resolutely individualistic conception of politics [in which] people are essentially competitors – rivals for space, for resources, for power, [and] the only bonds between citizens are contractual in nature…'[53] Villa points out that the same consequences arise where citizens are reduced to consumers of *private* goods and organisations, unable

[44] NW Barber, *The Constitutional State* (Oxford University Press 2010) 52.
[45] NW Barber, *Principles of Constitutionalism* (Oxford University Press 2018) chs 5 and 6; in particular, 151-52.
[46] Dana Villa, *Public Freedom* (Princeton University Press 2008) 12, ch 2 generally, 88, 266.
[47] Dana Villa, *Public Freedom* (Princeton University Press 2008) 88-89.
[48] Dana Villa, *Public Freedom* (Princeton University Press 2008) 88-89.
[49] Dana Villa, *Public Freedom* (Princeton University Press 2008) 266.
[50] Dana Villa, *Public Freedom* (Princeton University Press 2008) 300.
[51] Dana Villa, *Public Freedom* (Princeton University Press 2008) 266, 275. See also Paul Brest, 'Constitutional Citizenship' (1985) 34 Cleveland State Law Review 175, 188.
[52] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 100ff, 108ff, 114.
[53] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 107. See also Paul Brest, 'Constitutional Citizenship' (1985) 34 Cleveland State Law Review 175, 184ff.

to participate in the organisation of 'private' social life.[54] In the absence of meaningful control, people retreat into 'the automatism of everyday life.'[55]

Such circumstances pose great danger for constitutional democracy. At best, it makes trust unlikely and thus the co-operation necessary to obtain mutual benefits more difficult.[56] When people *do* participate in governance, they merely 'emerge' from their private lives to fight for their private interests against groups of other people doing the same.[57] At worst, it reduces compliance with law and allegiance to public institutions unless to do so is in one's private interest at that moment; as a result, the state must resort to ever more stringent methods of coercion.[58]

Even if we were unconcerned about the danger increased resort to coercion poses for individual rights, Dagger convincingly establishes that a society based on coercion is simply likely to be less *efficient* than one based on co-operation.[59] In light of the risks to public trust in and allegiance to institutions, and the draining of resources necessitated by coercion, it is manifestly in the interests of the state itself that its population consider and conduct themselves as citizens. This requires that individuals participate in political and social life, view each other as partners in a 'co-operative enterprise'[60] rather than competitors, and are willing (to some extent)[61] to subordinate their private interests to the common good of the community.

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[54] Dana Villa, *Public Freedom* (Princeton University Press 2008) 8, 127, 151, 208.
[55] Dana Villa, *Public Freedom* (Princeton University Press 2008) 324; see also 263.
[56] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 107-8; see also Dana Villa, *Public Freedom* (Princeton University Press 2008) 129.
[57] Dana Villa, *Public Freedom* (Princeton University Press 2008) 15, 53, 92, 127.
[58] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 107: 'If we take citizens to be consumers looking for the best bargain, then we should expect everyone to break the law whenever he or she finds obedience burdensome… When obedience seems burdensome, the law and those who enforce it will be seen as obstacles, or even opponents, that block the satisfaction of one's desires… As lawbreaking increases, however, and our own interests suffer, we have no recourse but to call for more police, more jails, and more coercion.' For similar sentiments, see NW Barber, *Principles of Constitutionalism* (Oxford University Press 2018) 90-92, 103; Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 128, where he characterises social pressure as 'the secret strength of law'.
[59] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 108; see also 89: 'The body politic… is supposed to be a co-operative enterprise.'
[60] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 89.
[61] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 96ff, 114ff.

However, they will only be willing to do any of this to the extent that they know others will do the same: as Dagger argues, nobody wants to be the 'sucker'.[62] Here we begin to see the relevance of equality in the concept of citizenship,[63] which will be discussed in more detail below and in the next chapter. We also see the need for a set of guarantees to the citizen in respect of some fundamental personal interests. Only if the citizen is reassured that at least the most important of his individual interests will be taken care of by the state will he be willing to participate in its institutions – his participation, indeed his membership of the state, has to be 'worth it'.[64] We generally conceive of these guarantees of the benefits of citizenship as rights.

Citizenship as membership-based rights

Marshall, in his classic exposition of citizenship in the modern state, discussed three sets of citizenship rights: civil, political and social. Civil rights are those which allow a person to have legal standing (own property, conclude contracts, file lawsuits, *etc*) and protect individual liberties of conscience and expression.[65] Political rights allow for democratic participation in the institutions of government.[66] Social rights comprise 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society',[67] exemplified by access to welfare state institutions. Marshall presents the gradual extension of each set of rights to all inhabitants of economically developed Western democracies as a historical narrative stretching from the 17th to mid-twentieth centuries.[68] Following Marshall, King and Waldron conclude that social rights, in the form of a welfare state, are entrenched as part of the commonly-shared understanding

[62] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 109-12.
[63] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 114; see also Dana Villa, *Public Freedom* (Princeton University Press 2008) 320.
[64] Like Villa, Dagger also argues that even the most publicly-minded citizen is only ever a 'conditional altruist'; see Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 114. See also Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1993) chs 10, 12, 13 and 16.
[65] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 419.
[66] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 419.
[67] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 419.
[68] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 420ff.

of citizenship in a modern state, rather than a politically-contingent financial programme that may or may not be pursued by a state – like, perhaps, the Poor Laws were.[69] Any member of a political community is entitled to the full set of rights (civil, political and social) against the state.

Barber views a conception of citizenship as a set of rights against the state as a rival to his own.[70] However, as noted above, it is better to consider this an alternative, complementary perspective on citizenship, and a necessary safeguard for the citizen-as-participator to make his participation worthwhile. Part of the reason Barber is suspicious of the rights-based model of citizenship is that he thinks its proponents consider citizenship to be *exhausted* by rights, with insufficient regard for the value of participation in government.[71] This risks citizens devolving to mere 'consumers' of public goods to which they are entitled.[72] However, King and Waldron offer a more sophisticated view. They accept that '[t]he most familiar notion of political citizenship that we have is of the citizen as a participator',[73] but argue that meaningful participation is only possible where all three sets of rights are in place.[74]

There are three reasons for this: the first, also averted to by Barber,[75] is that citizens cannot concentrate on politics if their basic material needs are not met, cannot understand political issues if they are insufficiently educated and informed, *etc*.[76] Second, as mentioned above, the citizen will only see it as desirable to participate in the state if he knows his personal interests will be protected. Villa warns against falling into the trap of '*polis*-envy' – undue fixation on participation in the public political sphere, the idealised *agora* of classical Athens. He points out that even the most conscientious citizen's tolerance of politics for politics' sake is limited.[77] Political participation is sometimes difficult and often boring; as

[69] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 417, 422ff.
[70] NW Barber, *The Constitutional State* (Oxford University Press 2010) 50-51.
[71] NW Barber, *The Constitutional State* (Oxford University Press 2010) 50-51.
[72] See also Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) 105ff; Dana Villa, *Public Freedom* (Princeton University Press 2008) 157.
[73] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 425.
[74] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 425.
[75] NW Barber, *The Constitutional State* (Oxford University Press 2010) 51.
[76] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 428-29.
[77] Dana Villa, *Public Freedom* (Princeton University Press 2008) 339; see also 141, 157, 300, 331.

a result, the state needs to incentivise people to act like citizens, generally by promising to enforce their rights.

Third, in order to participate meaningfully, citizens must be in a position to exercise their own political judgment independently from one another. King and Waldron are concerned that, in conditions of great economic inequality or widespread poverty, the poor man would act in public life not as a citizen, but as 'a member of a… retinue or as a mere mouthpiece for another.'[78] They are adamant that:

> [N]o one must be rich enough to be able to purchase the dependence of another, and none poor enough to be bought in that way… There are, therefore, good civic reasons for ensuring, on the one hand, that no one is in a position to do this, and, on the other, that no one is so economically vulnerable that he or she would be tempted to sell his or her civic obligations for the food and shelter he or she needs to live.[79]

Both of these King and Waldron present as justifications for social welfare provision, and it is certainly true that providing a social safety net reduces the incentive to 'sell' one's civic obligations (and rights).[80] As outlined above, the role and value of a welfare state is beyond the scope of this thesis. However, the justifications offered by King and Waldron hint at an underlying concern: the need to protect individual citizens from undue influence by their richer and more powerful fellows.[81] By providing social welfare, the state allows its citizens economic independence from one another, as a means to the end of *political* independence. It allows citizens to resist private power, which would otherwise corral them into a 'retinue'. On their view, the purpose of the rights associated with citizenship is that institutions of the state will mediate private interactions so as to overcome disparities of private power.

[78] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.
[79] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.
[80] For similar line of thought, see Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017).
[81] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.

Of course, the social rights Marshall presents as the pinnacle of citizenship are not the only means by which the state can assist its citizens in achieving political independence from one another. Many areas of law contribute to this project: for example, by prohibiting murder and assault, the state prevents citizens using violence or the threat thereof to control others. All kinds of legal rights, therefore, put the institutions of the state at the service of citizens who invoke them, lending the economic and other resources of the state (in other words, the state's power) to the individual, to overcome the countervailing power of others.[82] This will be discussed in more detail in Chapter 5.

King and Waldron are clearly concerned about how citizens treat *each other*, and they think that rights against the state to various socio-economic benefits help create the conditions in which citizens will interact in 'a certain spirit of fraternity'.[83] Having rights, and knowing that others have rights in turn, generates a shared sense of 'belonging' to a political community.[84] Citizenship 'means not only political participation, but all aspects of what it is to be a *member* of a society.'[85] This is why Bauböck calls citizenship 'the bundle of membership-based rights enjoyed by an individual',[86] and Dworkin talks about rights as being necessary to 'moral membership' of a political community.[87] Citizens do not merely participate in society, they participate *on certain terms*. This is far from suggesting that citizens are only 'in it for what they can get out if it'. Rather than thinking citizenship is reducible to or exhausted by rights, it is better to say that the relationship between citizen and state is *conditioned* by rights. In the characterisation of citizenship as 'membership-based rights', it is in fact the *membership* rather than the *rights* that is more important for the purposes of our theory.[88] We should think about the rights of citizens in terms of how they support full, active membership of a political community, on legitimate terms.

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[82] For related discussion, see John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) ch 6; and *Torts and Other Wrongs* (Oxford University Press 2019) chs 3, 4, 7, 10.

[83] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.

[84] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 431ff.

[85] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 432 (emphasis original).

[86] Ranier Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8(2) Theoretical Inquiries in Law 453, 468.

[87] Ronald Dworkin, *Freedom's Law* (Oxford University Press 1996).

[88] Of course, for any given individual (particularly someone in a vulnerable position at a particular time), the substantive content of his rights may matter more than the fact they are shared with others on the basis of common membership of society. This is particularly so if, as is often the case, he feels little affinity with the 'mainstream' of society – perhaps is even marginalised from society. The theoretical salience of the rights, however, is the way in which their existence and content contribute to our understanding of the relationship

There is no reason to think that the *only* conditions for this kind of membership will be rights against the state, even the expansive set of social rights advocated by Marshall, King and Waldron. Members of the community must interact with *each other* on certain terms as well. This is not (yet) to claim that we need similar rights against each other as we do against the state (that discussion will have to wait until Chapter 5), but it is once again to acknowledge that citizenship has a 'horizontal' dimension. We know from the previous section that participation is more effective if it is co-operative rather than competitive or coercive. On the other hand, citizens must be sufficiently independent from each other so as to bring their own independent judgment to bear on political and social affairs. They must be able to act in accordance with their *own* conception of the common good, rather than become a 'mere mouthpiece' for another, to whose power they are subject.[89] Private power clearly poses a danger to political independence and meaningful participation, and a constitutional concern for citizenship will have to address that. But as the next section will explain, just as citizenship extends beyond political participation and rights, the dangers of private power extend beyond interfering with participation or rights. It will focus on the personal and interpersonal effects of one citizen being subject to another's power, and highlight why open-ended, formalised power relationships are antithetical to a community of citizens.

Citizenship as non-domination

In his work, Pettit warns against tying citizenship too closely to participation in government, especially participation through electoral democracy,[90] and membership in political community to rights, however expansive. He does value democratic political activity,[91] but takes a broader view of the citizen's position within the state. He is

between the individual and the state, and others in society. Rights help constitute the terms of this relationship – of membership of society – but for present purposes, it is the concept of citizenship as membership of society that matters.

[89] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.

[90] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) generally, but in particular 27ff, 285ff. At 285, Pettit claims that the republican tradition he seeks to revive originally developed as a Roman critique of the 'pseudo-Athenian' attachment to democratic participation as the apotheosis of citizenship.

[91] Pettit says the citizenry of a republican state must be 'contestatory', which will generally (but not exclusively) be expressed through electoral politics: see Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 17, ch 3; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) ch 6.

particularly resistant to an idea that citizenship would be *exhausted* by participation in government,[92] or *reducible* to a set of legal rights against the state, because this 'tends to downplay private life'.[93] Pettit highlights that citizenship is also a relationship between the citizen *and others in society*: his citizens 'would each be able to walk tall, live without shame or indignity, and look one another in the eye without reason for fear or deference.'[94]

In his focus on participation in government as the 'core' of citizenship, Barber contrasts the citizen to the *subject*, a person who is a member of the state and is affected by its decisions and actions, but does not participate in them.[95] Pettit also defines the citizen oppositionally,[96] but along very different lines to Barber.[97] On his view, the antithesis of the citizen is not the *subject*, but the *slave*.[98] This has significant implications for the content of citizenship status, particularly in what it means for relations between individuals. Citizenship is undermined by relationships of 'domination' between individuals as much as it is by undemocratic or otherwise oppressive government.

Republican theory and domination

Republican political theory, of which Pettit is the most significant contemporary proponent, focuses on the need to eliminate 'domination' in society.[99] Domination is the power of an

[92] To be fair to Barber, he does not expressly limit citizenship to participation in government. But he does not devote much space in his work to what else citizenship involves, considering its impact on private relations to be peripheral to the core of the concept.
[93] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 18.
[94] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 3.
[95] This approach of defining the citizen oppositionally can also be seen implicitly in Marshall's model, although he posits four sets of contrastive positions: a person with no rights; a person with legal rights only; a person with legal and political rights but not social rights; and a person with all three sets of rights (the modern citizen).
[96] For a discussion of his oppositional methodology, see Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 20-21.
[97] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 285.
[98] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 27.
[99] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 1: 'Every philosophy of the good society starts with an account of the canonical complaint that the state should help put right: the evil that the society should drive out by means of political organisation and initiative'; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 4-5: 'The grievance I have in mind is that of having to live at the mercy of another, having to live in a manner that leaves you vulnerable to some ill that the other is in a position arbitrarily to impose.'

individual to 'interfere on an arbitrary basis with the choices of the dominated'.[100] The dominated person (of whom the archetype is the slave) cannot pass the 'eyeball test':[101] he cannot look the person who enjoys domination over him in the eye without 'reason for fear or deference'. Dominated people:

> …live in the shadow of the other's presence, even if no arm is raised against them. They live in uncertainty about the other's reactions and in need of keeping a weather eye open for the other's moods. They find themselves in a position where they are demeaned by their vulnerability, being unable to look the other in the eye, and where they may even be forced to fawn or toady or flatter in the attempt to ingratiate themselves.[102]

This is even so when the dominator is kind,[103] or unlikely to ever actually interfere with the dominated.[104] In such circumstances, the dominated person is 'extremely insecure', safe only because of his 'eternal discretion', or because he is able to 'ingratiate' and 'placate' the dominator, or is 'cunning' enough 'to keep out of their way when trouble is brewing', or is simply lucky.[105] He must account for the preferences, whims and reactions of the dominator in making decisions,[106] including about areas of choice fundamental to his sense of self.[107] The person who is free from domination, on the other hand, can safely say: 'Let the agents in question take against me; let me fail to be good at toadying to them; let me lose the cunning required to keep out of their way. None of this matters if I really enjoy non-domination'.[108]

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[100] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 22. See also Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 50; for a general discussion of choice, interference and domination, see ch 1.
[101] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 47, and *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 5.
[102] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 5; see also 69.
[103] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 32, 34-35, 64, 69.
[104] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 8-9, 64.
[105] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 69.
[106] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 60.
[107] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 92ff, 103.
[108] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 69.

The experience of domination has a dehumanising effect on a person. This can be seen in the 'lurid' passage Pettit cites from Price:

> Like cattle inured to the yoke, they are driven on in one track, afraid of speaking or even thinking on the most interesting points, looking up continually to a poor creature who is their master, their powers fettered, and some of the noblest springs of action in human nature rendered useless within them.[109]

In other words, domination is an affront to human dignity, and the status of citizenship is the redemption of that dignity. Republican theory more generally is clearly a dignitarian project, intensely concerned with dignitarian harms like 'shame'.[110] There is, of course, plenty of labour law scholarship, some of which was surveyed in Chapter 2, that defends 'human rights at work' from the perspective of human dignity.[111] We examined the dignitarian justifications for labour law in Chapter 3. But this thesis bases its theory on the concept of citizenship for the following reasons.

First, an important point to make here is that citizenship and dignity are by no means rivalrous concepts. Dignity is clearly a background normative value that helps us to understand how a citizen should be treated – in other words, what citizenship *is* and what is so good about it – just like the values of freedom, autonomy, participation, rationality,

[109] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 34.
[110] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 5, 22, ch 3 generally and 90ff in particular, 113ff, and *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 82-87. Of course, Pettit is still concerned with material poverty: see *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 113-17, 141ff, and *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 127.
[111] See, for example, Article 23 UDHR; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3(2) European Labour Law Journal 151, 166; Christopher McCrudden, 'Labour Law as Human Rights Law: A Critique of the Use of "Dignity" by Freedland and Kountouris' in Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, *The Autonomy of Labour Law* (Hart Publishing 2015) ch 11, 280, 287-88; Joe Atkinson, 'Human Rights as Foundations of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 7, and 'Labour Law and Human Rights: Legal and Philosophical Perspectives' (PhD thesis, University College London 2020) 68-69, 182. For a different perspective on some of the same issues, see Alejo José G Sison, Ignacio Ferrero, and Gregorio Guitián, 'Human Dignity and The Dignity of Work: Insights from Catholic Social Teaching' (2016) 26(4) Business Ethics Quarterly 503. There is no need to attempt a definition of 'dignity' here (a subject on which much scholarly ink has already been spilled): for a wide-ranging discussion, see Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

etc help us to understand citizenship. But there is no reason to think that 'dignity' as a value subsumes all these other values that are important for citizens to have.[112]

Second, dignity appears to demand either too much or too little from constitutional labour law. On the one hand, the kinds of rights that form the backbone of constitutional labour law as will be expounded in this thesis do not capture the sort of *material* conditions that may be necessary to live a dignified life. On the other, in general it seems that the actions of an employer would only violate human dignity *in extremis* – corporal punishment probably would, but dismissal because of a racist Facebook post probably would not. Moreover, the invocation of dignity in constitutional labour law raises concerns, well-founded or not, about paternalism. Some criticism of the *Wackenheim* case,[113] for example, is that there must be something undignified in the state deciding for you what your dignity requires.[114] However, as we will see in the next chapter, the state also has its *own* institutional interests in the development of citizenship among its people, which may justify putting 'civic obligations' on people where their interest in their own dignity may not – including not allowing them to 'trade off' certain rights against other interests of theirs, by means of legal contracts.[115] The value of these political institutions is important to citizenship in a way it is not for dignity. Relatedly, dignity sometimes pulls in conflicting directions within the same circumstances:[116] Mr Wackenheim claimed his dignity required he be able to earn the decent living he made in the dwarf-throwing industry. Citizenship has more potential to resolve both of these weaknesses, because it brings us to collective decision-making through political institutions, to settle the conflicting demands made by a set of values.

Third, citizenship helps us understand membership of and participation in a political community, the relationships between members of that community, and the role played by

[112] Dignity might offer a normative wellspring for our concern about the harm done by domination or other forms of mistreatment. It might attune us to some of the negative consequences for workers caused by a denial of human rights at work, especially where these do not manifest as worse material conditions.
[113] *Wackenheim v France* (2002) CCPR/C/75/D/854/1999 (UN Human Rights Committee, communication no 854/1999).
[114] For related criticism of dignity as a political ideal, see Michael Rosen, 'Dignity: the Case Against' in in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 7.
[115] *Cf* the argument in Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Review 27, which will be returned to in Chapter 5.
[116] See also Christoph Möllers, 'The Triple Dilemma of Human Dignity: a Case Study' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 9.

institutions of the community.[117] Dignity, being abstracted from the particularities of any given state, misses the relational element that citizenship helps us capture: one might always *have* dignity, but one cannot simply *be* a citizen; one must be a citizen *of a state*, alongside *other citizens*.[118] Citizenship shows us what precisely is 'undignified' about being subject to the power of other people in one's society, or unable to participate in collective decision-making on equal terms with others, through political institutions.

Waldron argues that dignity is ultimately parasitic on 'the dignity of (potential) citizenship' – being a function of our rational, sociable nature, 'dignity' is simply our *capacity* to live together with others in a polity according to commonly-agreed laws.[119] This capacity is realised when we become citizens.[120] Our dignity is vindicated insofar as we are citizens, and are treated as such by others in the society in which we live.[121] Waldron acknowledges that human dignity appears to 'abstract' from the relationship with a particular state that citizenship implies,[122] and demand 'human rights' which exist outside of any particular legal order – potentially avoiding altogether the exclusionary concern we dispelled above. However, it is clear that 'if one were not a citizen of a community, there [is] no legal framework within which one could agitate for one's rights.'[123] That is why Arendt famously

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[117] For a discussion of the relationship between citizenship and relational solidarity, see Catharine Barnard, 'The Future of Equality Law: Equality and Beyond' in Catharine Barnard, Simon Deakin and Gillian S Morris, *The Future of Labour Law* (Hart Publishing 2004) ch 10. That is not to say that dignity has not been interpreted as including interpersonal relationships – far from it, particularly in the philosophical tradition of Catholic Social Teaching: see, for example, Alejo José G Sison, Ignacio Ferrero, and Gregorio Guitián, 'Human Dignity and The Dignity of Work: Insights from Catholic Social Teaching' (2016) 26(4) Business Ethics Quarterly 503, 507-10.

[118] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335-36.

[119] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 331.

[120] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 330-32. To be clear, this does not necessarily require us to agree with Hegel that 'all the worth which the human being possesses, all spiritual reality, he possesses through the state… Thus only is he fully conscious; thus only is he a partaker of morality – of a just and moral social and political life': see Dana Villa, *Public Freedom* (Princeton University Press 2008) 71ff.

[121] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 334, 340. As such, dignity is a status in society, rather than a pre-existing interest for society to protect: see John Tasioulas, 'Human Dignity and the Foundation of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 16.

[122] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 335-36.

[123] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 338. Of course, the recognition that without the institutional protection that citizenship gives, human rights were meaningless and human dignity unattainable was classically expounded by Arendt in her discussion of the desperate condition of statelessness: see Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951) 295.

characterised citizenship as 'the right to have rights'.[124] To this assessment, Villa adds: 'The constitutional state is first and foremost the legal guarantor of rights for all; it is the artificial structure that makes civilisation and a recognisably human life possible.'[125] In a similar vein, Waldron concludes:

> The great declarations and covenants of human rights associate rights very closely with human dignity, and it might seem that this association eclipses mere rights of citizenship. But it turns out both in practice and in theory that human rights are not normally secure unless they are incorporated in each country into the legal fabric that provides for citizenship. In real terms, then, the dignity of the citizen will be a necessary concomitant of human dignity.[126]

To paraphrase Kant, nobody can be without any dignity *so long as* he has at least the dignity of a citizen.[127] Citizenship is the best guarantor of dignity.[128] If one supports constitutional labour law because of an underlying concern to protect human dignity of workers, deriving constitutional labour law from an account of citizenship is the best way to go about that.

The social effects of domination

So far, the discussion of domination and its effects on the dignity of the individual has been framed in terms of an *internal* feeling of subjugation in the dominated person. Equally important is the fact that one person enjoys domination over the other is generally well-known to both parties, and to others.[129] As such, the dominated person lacks social esteem and standing. By contrast, non-domination is connected:

> …with subjective self-image and intersubjective status. It means that the enjoyment of non-domination in relation to another agent – at least when that agent is a person

[124] Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951) 291.
[125] Dana Villa, *Public Freedom* (Princeton University Press 2008) 250.
[126] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 338.
[127] Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in Mary Gregor (ed), *Practical Philosophy* (Cambridge University Press 1999) 471: 'Certainly no human being can be without any dignity, since he has at least the dignity of a citizen.'
[128] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 336.
[129] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 70.

> – goes with being able to look the other in the eye, confident in the shared knowledge that it is not by their leave that you pursue your innocent, non-interfering choices; you pursue those choices, as of *publicly recognized right*. You do not have to live either in fear of that other, then, or in deference to them. The non-interference you enjoy at the hands of others is not enjoyed by their grace and you do not live at their mercy. *You are a somebody in relation to them*, not a nobody. You are a person in your own legal and social right.[130]

This latter comment is particularly instructive. The first level of Marshall's model of citizenship as rights (legal rights) was about recognising the right-holder as a person. Pettit highlights that formal legal rights against the state are, on their own, insufficient for that purpose. To count as a person in one's own right in society, one must hold a certain status and be held in a certain regard by others.

As stated above, to explain what that status is, republican theory contrasts the citizen with the slave.[131] However, it is important to consider carefully what Pettit and other republicans mean by slavery. It is not formal legal ownership that defines the slave, but his condition of absolute domination; or rather, 'ownership' is simply a way to describe the powers of control associated with domination. Of course, modern property theory has developed more sophisticated ways of understanding the notion of ownership, which emphasise that ownership of *things* implies control over *people*.[132] The relationship between ownership of business assets (the means of production) and control over people involved in the productive process (workers) will be returned to in Chapters 6 and 7. For the moment, we need simply to observe that just as ownership consists of powers and claims to obligations against other people,[133] it is not a misuse of the term 'slavery' to refer to levels and kinds

[130] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 71 (emphasis added).
[131] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 31-32: 'The republican tradition is unanimous in casting freedom as the opposite of slavery, and in seeing exposure to the arbitrary will of another, or living at the mercy of another, as the great evil… Whereas the slave lived at the beck and call of a master, the free person enjoyed a status at the other extreme… The *liber* was, of necessity, a *civis* or citizen'.
[132] Classic texts in this vein include Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Quarterly 470; Morris R Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Quarterly 8.
[133] See, for example, Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000), 'Property as the Law of Democracy' (2013-14) 63(6) Duke Law Journal 1287, and 'Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society' (2014-15) 1 Journal of Law, Property, and Society 1; ; Jeremy Waldron, 'Homelessness and the issue of freedom' in *Liberal Rights* (Cambridge

of control that may be less than legal ownership, but still amount to domination. Although being legally owned by another person may be the archetype of slavery, the absence of formal legal ownership does not, of itself, mean a person is not a slave in the relevant sense, if other indices of domination are present. Domination is a matter of *degree*, and therefore the contrast between citizen and slave is a *spectrum* between two extremes.[134] One might be less dominated than a person who is legally owned by another person, but still not qualify as a citizen: Pettit's theory admits the possibility of the *servus sine domino* – the 'slave without a master'.[135]

Unfortunately, Pettit does not elaborate on the concept of the *servus sine domino*, except to say that he 'might be picked upon by anyone'.[136] A few general conclusions can nonetheless be drawn. In one sense, the *servus sine domino* is better off than the archetypal *servus*. To put it somewhat reductively, he can move around from master to master, or serve multiple masters at any given time. He can, therefore, seek out the kindest master to serve, the one who is least likely to subject him to interference.[137] However, as explained above, an absence of actual interference is not freedom if domination (the *capacity* to arbitrarily interfere) remains; the slave of a kind master is no less a slave. In another sense, the *servus sine domino* is at least as badly off as the *servus* – he cannot look *anyone* in society (or rather, anyone who is not also a *servus*) in the eye without fear or deference, just in case it transpires they have the power to dominate him. This will likely generate *more* strategic deference, since the source of domination is unpredictable. In this way, he seems comparable to 'free' workers in certain industries, particularly those characterised by high supply of labour relative to demand, transient contractual arrangements, and lack of organisation of labour.[138]

University Press 1994) ch 13; Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press 2017), and 'The Holy Grail of Progressive Property' (2019-20) 29(3) Cornell Journal of Law and Public Policy 717; Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021).

[134] See also NW Barber, *The Constitutional State* (Oxford University Press 2010) 53.

[135] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 32.

[136] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 32.

[137] Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press 2017) ch 3 argues that, properly supported by appropriate retraining and welfare, the 'right of exit' is the best way to reduce domination. This stands in contrast to Pettit's work, in particular Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 73, 141ff.

[138] This foreshadows the discussion in the next chapter, where it will be argued that the worker subject to domination approximates Pettit's *servus sine domino*, a sentiment shared by Pettit himself: see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 141ff. See also Elizabeth Anderson, *Private Government* (Princeton University Press 2017), especially 34, 55, 61ff, 141; and Dana Villa, *Public Freedom* (Princeton University Press 2008) 127ff, 144, 260, 266. To use a term Irish

While archetypal slavery can be prohibited by the abolition of private property rights in human beings, slavery insofar as it encompasses the *servus sine domino* can only be prevented by state intervention to eliminate private domination. Only then can a person be 'a *civis*, or citizen, with all that that implie[s] in the way of protection against interference.'[139] For Pettit, it is the robustness of these legal protections that constitutes citizenship. Freedom from domination is identical with citizenship, and *vice-versa* – 'the *liber* [free person] is, of necessity, a *civis*'.[140]

We should, of course, be careful not to invoke the horror of 'true' slavery too lightly. Although Pettit and other republicans generally draw on classical history, we know that in more recent times slavery became inextricably and abhorrently racialised. The legacy of slavery in the early modern West, particularly the Atlantic slave trade, is pervasive systemic racism and racialised poverty. In a way, however, that very fact helps bolster the point that the domination slavery represents is a matter of degree: even two centuries after the abolition of legal ownership of people, many descendants of slaves remain dominated, and the descendants of slave owners have found plenty of ways to perpetuate domination without formal ownership.[141]

Pettit's discussion of the contrast between citizenship and slavery implies a concern that in societies where formal legal ownership of human beings is thankfully consigned to the relatively distant past, we have lost touch with the instinctive aversion to the domination

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readers of a certain vintage will be familiar with, he is a *spailpín fánach*, wandering the countryside, serving whichever of the *bodairí na tíre* will have him; everywhere he goes, he feels the social stigma associated with being universally recognised as vulnerable to domination. (Somewhat disappointingly, him being a Galway man, Pettit does not make reference to '*An Spailpín Fánach*'). For readers unfamiliar, '*An Spailpín Fánach*' (Anon, unknown date) is a poem narrated by an itinerant farm labourer (the eponymous *spailpín*) who describes his journeys around the south of Ireland in search of work; the best he can hope for is that one of the local landowners (*bodairí na tíre*) will see him sitting bedraggled by the roadside and offer him a day's work. By the end of the poem, he begins to lose patience with the humiliation of everyone he meets looking down on him ('*sin chu'ibh an spailpín fánach*' – 'here comes the wandering labourer') and suggests he will flee to France or join a rebel army in Ireland and 'drench his pike in blood' rather than continue to use it as a farming implement. This thesis expresses no view on the reasonableness or otherwise of this response to oppressive working conditions.

[139] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 32.

[140] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 32; see also 27ff.

[141] In the United States of America, there is a persistent poverty gap between (in particular) white and Black people – although thankfully the poverty rate for marginalised racial groups has been declining in recent years (at least before the Covid-19 pandemic). For data, see US Census Bureau, 'Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019: Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups' <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> accessed 16 June 2022.

that slavery exemplifies. He fears this absence makes it *more* difficult to discuss the forms of domination that remain; without a public consciousness of the evil of slavery,[142] we lack the intellectual currency or political vocabulary to adequately capture some of the value of its opposite, citizenship. Of course, Pettit's concern may be overstated: the language of 'modern slavery' is still used for certain kinds of exploitative labour practices.[143] But he is right to observe that we have lost touch with the link between freedom from slavery, and citizenship, in its political and social senses. The absence of legal ownership of human beings should be no reason to neglect the interpersonal and intersubjective dimension of citizenship, and its consequences for the constitutional state. We too quickly draw the contrast between citizen and subject, or reduce citizenship to a set of rights, as if one's relationship with the state itself was all that mattered for participation in the state and one's place in the community.

As Villa puts it, the purpose of citizenship is so that 'the commoner could address the aristocrat'.[144] But on what terms, and in what spirit? Clearly, the 'eyeball test' requires that citizens interact 'without fear or deference', or servile flattery. However, we should not think that citizenship merely facilitates frank confrontation between individuals in society. Confrontation is, of course, important: especially where people have widely diverging personal interests and incentives (like workers and bosses), any sort of meaningful participation in collective decision-making is likely to involve some level of confrontation. On the other hand, a constitutional democracy characterised by polarised interests and confrontational politics is unlikely to work efficiently towards the common good, nor perhaps to remain a constitutional democracy for very long.[145] As we have already seen, and will return to in Chapter 6, citizenship implies *co-operation* as well as confrontation.

According to Barber, a citizen 'owes duties to her fellow citizens [which] condition the ways in which citizens should treat each other'.[146] As a basic requirement, citizens must

[142] Of course, Pettit wrote before the recent backlash against iconography associated with early modern slavery and its proponents, particularly in the USA and UK.
[143] See, for example, the UK's Modern Slavery Act 2015; and the discussion in Virginia Mantouvalou, 'Modern Slavery: The UK Response' (2010) 39(4) Industrial Law Journal 425, and 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) Modern Law Review 1017.
[144] Dana Villa, *Public Freedom* (Princeton University Press 2008) 179.
[145] Dana Villa, *Public Freedom* (Princeton University Press 2008) chs 1, 4, 9, 10. See also Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997).
[146] NW Barber, *The Constitutional State* (Oxford University Press 2010) 53. See also Paul Brest, 'Constitutional Citizenship' (1985) 34 Cleveland State Law Review 175, 195.

facilitate the participation of their fellow citizens in the state, 'listen to other citizens and value their interests';[147] at their best, citizens aspire to 'the virtues of friendship, loyalty and teamwork' between each other.[148] Similarly, King and Waldron say that 'a certain spirit of fraternity [must] exist among citizens; they must regard one another as friends and work on a basis of goodwill and mutual understanding.'[149] Indeed, the key insight we took from the conception of citizenship as 'membership-based rights' is that the *membership* might matter more than the *rights*. Citizenship is a marker of *whom* we each consider appropriate to co-operate with in collective decision-making. To regard another as a *concitoyen* is to treat him as a partner in a co-operative social and political enterprise, rather than merely (say) an economic actor or resource. It is to acknowledge common cause with this other in social and political life. We will see in Chapters 5 and 6 what this means for economic relationships like employment.

Conclusion

The concept of citizenship has a long and storied history in constitutional theory. Although different authors have taken a variety of perspectives on this concept, a number of common threads can be observed. The three perspectives on citizenship explored in this chapter tell us that citizens are members (*full* members) of a political community. They participate in the governance of their community and in community life, on certain terms that protect their important personal interests, which are roughly equal to each other,[150] and they interact with each other in a spirit that reflects a certain regard for themselves and each other. Even if we were to limit the 'core' of citizenship to participation in the state (as Barber suggests),[151] the need for participation to be meaningful, and to incentivise citizens to do what would otherwise be time-consuming and boring, leads us to the conclusion that citizens need rights. It also helps us figure out what at least some of those rights should be. We also need to ensure that citizens are politically independent from one another, which means being resistant to the influence of private power.

[147] NW Barber, *The Constitutional State* (Oxford University Press 2010) 53.
[148] NW Barber, *The Constitutional State* (Oxford University Press 2010) 55.
[149] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.
[150] Equality of citizens will be discussed in the next chapter.
[151] NW Barber, *The Constitutional State* (Oxford University Press 2010) 50.

This broader view of citizenship brings the challenge posed by private power into focus. A relationship of domination between two individuals is fundamentally inconsistent with a recognition of common, equal membership of a political community. To vindicate the shared status of citizenship, any authority exercised by one citizen over another must be limited in its scope and legitimate in its basis – otherwise, it risks straying into arbitrariness and domination, and the spirit of common citizenship is lost. It is therefore a matter of intense concern within a constitutional state to limit the scope of private power, and ensure that what remains is of legitimate source and operation.[152] Rights, by lending the resources of the state to a citizen, serve this goal too: to borrow from Pettit, they act as weapons of 'anti-power'.[153] This allows citizens to regard one another not as supplicants or resources to be exploited on the one hand, and masters to be appeased on the other, but as partners in a co-operative political enterprise.

This thesis argues that promoting citizenship, and the political independence this implies, is also a core concern of labour law. Obviously, this cannot be by means of economic independence: it is hard to see how an employee could ever be economically independent of his employer.[154] The relationship of employment is by its very nature defined by economic dependence. However, the next chapter will demonstrate that the political independence and 'spirit of fraternity' necessary for citizenship can, and should, be protected within the labour relationship, by means of certain justiciable rights against employers, and other participatory structures. These will serve to restrict the private power of employers, so that whatever authority is exercised by one citizen over another in this relationship is both limited and legitimate.

[152] Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press 1997) ch 7 talks about 'encouraging citizenship' among the population.
[153] Philip Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576.
[154] That is not to say that the dependence cannot be made more secure: for example, by protection against unfair dismissal.

CHAPTER 5:
LABOUR, CITIZENSHIP AND CONSTITUTIONALISM

Introduction

The questions at the heart of this thesis are why and how constitutional norms should impact on the private labour relationship. In Chapter 2, we identified a number of issues that will need to be addressed by any theory purporting to answer those questions. These are worth restating:

1. What sorts of rights should be protected by constitutional labour law;
2. Why these rights are an important concern for labour law;
3. Why these rights should be enforced horizontally *at all*, and why against private employers *in particular*;
4. To what extent the rights should be balanced or adapted to the employment context;
5. Why the rights in question should be entrenched against waiver by the worker in a contract of employment; and
6. Why this is an appropriate subject matter for *constitutional* intervention and concern.

Of course, constitutional labour law is not exhausted by individual rights, but involves constitutional norms more broadly. However, a significant proportion of this chapter's focus needs to be on rights, because that is where the issues of waiver, selectivity, horizontality and the balancing of rights come through most clearly.

The previous chapter explained the concept of citizenship that forms the basis of the theory advanced in this thesis. Taken with the insights of Chapter 3, we can see that the realisation of this status of citizenship for workers has always been an animating goal of labour law (albeit not the only one). This chapter will clarify the relationship between citizenship status and constitutional labour law in particular. It will examine the threats posed by the labour relationship to workers' ability to function as citizens, and the need to place constraints on employer authority within the constitutional settlement of a polity. It therefore finishes off

the argument that the specific role being played by constitutional labour law is, and should be, to safeguard the citizenship of workers.

The chapter will then turn its attention to the practicalities of constitutional labour law, in developing answers for those issues left open at the end of Chapter 2: the problems of waiver, horizontality, and the balancing of rights. It will also address the question of selectivity in the protection of rights through constitutional labour law, setting the stage for Part III of this thesis, in which a sketch will be offered of a doctrinal programme for constitutional labour law.

The citizen as an office of the state

From the previous chapter, we now have our image of the citizen: someone who participates in political and civic-social life as a full member of a society, on terms that safeguard certain core interests so as to make membership of that society worthwhile. They participate on roughly equal terms with everyone else in that society, in the sense that none are subject to the arbitrary will or domination of another. As such, they enjoy political independence from one another, which enables their participation to be motivated by their own preferences, opinions and judgments rather than pressure brought to bear by another person.

We know already that citizenship is inherently bound up with a state. Although all sorts of communities can have members that treat each other as equals and recognise certain safeguards of each others' interests, only states have citizens in the sense we elaborated in Chapter 4. We can see quite clearly, however, that not all states have citizens – or rather, some states might have only very few 'citizens' (perhaps even just one) making up a ruling elite over the rest of the 'subject' or 'slave' population resident in that state.[1] Citizenship in the ideal sense we have been talking about is 'pervasive', or widely-shared among the population.[2] In that way, citizenship is a characteristic or incident of a *democratic* state. As Waldron puts it, 'roughly, a democracy is a republic in which all adult men and women are

[1] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18; Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.
[2] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 334-35.

citizens'.[3] We might caveat this by recalling that both citizenship and democracy are matters of degree, so a state might be more democratic the more of its adult population are (or are entitled to become, perhaps after a certain period of residence or integration) citizens.

Here is not the place for a full exposition of the concept of democracy. We can see from Waldron's rough definition that whatever else democracy might entail, it must at least require that people are entitled to participate in politics and society as citizens in the sense we explained above. In other words, a state that does not protect the ability of its citizens to act as such is in danger of drifting from democracy to some other political system. The relationship between worker and employer is political in nature, because it affects how each party to that relationship (particularly workers) can participate in democratic governance. This means that the constitution must, to some extent, be concerned with that relationship – even if it is necessarily less concerned with the labour relationship than, say, the relationship between legislature and executive.

Barber argues that the citizen is an 'office of the state'[4] (like president, prime minister, judge or member of parliament). The citizen has a special kind of relationship to the state as an institution, and to various other offices by which the state is governed – for example, voting for the legislature, serving on a jury to assist judges, or paying taxes to public officials.[5] As such, the office of citizen has powers, obligations and incidents of a constitutional nature. This 'bundle of rights and duties' (to use a phrase we encountered in the previous chapter) is constitutional because it relates to the governance of the state, in which the citizen shares.[6] The rights and duties define the parameters of the office of citizen, and its relationship to other public offices. These are clearly *constitutional* rules, because they determine how the state is run and how its institutions interact. If citizens do not share in the governance of the state, the state cannot be a democracy – or rather, the less that citizens share in governance (that is, the less that people are treated, and act, like citizens), the less democratic the state is. To the extent a state holds itself out as being a democracy, and to the extent the constitution is designed to protect democracy, it must offer

[3] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 425.
[4] NW Barber, *The Constitutional State* (Oxford University Press 2010) 49-50.
[5] NW Barber, *The Constitutional State* (Oxford University Press 2010) 50-52.
[6] NW Barber, *The Constitutional State* (Oxford University Press 2010) 49.

its citizens laws that define that office so as to allow those who hold it to play their role in the democratic system; to the extent that law defines the *labour* relationship of such office-holders, that is constitutional labour law.[7] Constitutional labour law thus helps define the office of the citizen.

Moreover, constitutional labour law helps define the office of citizen in a particular way – it conditions the relationship between citizens. Of course, some constitutional labour law will be 'vertical' – workers enjoy constitutional rights against the state in its capacity as employer, plus some constitutional labour law deals with the constitutionality of public decision-making processes, like specialist labour bodies. But this thesis has identified from the beginning the need to explain and justify the 'horizontal' application of rights in the private labour relationship. As will be elaborated later in this chapter, the best way to think about this horizontal effect is by comparison with a doctrine like the separation of powers. The idea is to achieve a balance between institutions of the state, so that none are dominated by the others, and each have 'self-defence mechanisms' to preserve their specific role in governance of the polity.[8] Because the citizen is an office of the state like a judge or parliamentarian, he (and the organisations that represent him in certain capacities) should enjoy rights as self-defence mechanisms against domination by other offices of the state (other citizens in their capacities as employers). Before we get to that, we need to return to the nature of the labour relationship – and specifically, the threat to citizenship that lies within this relationship.

Domination at work

The granting of rights as self-defence mechanisms assumes that there is a threat to the institutional prerogatives of that office of the state from other actors against whom the rights exist. In other words, constitutional labour law exists to counteract a risk of

[7] Sometimes this law might not look like constitutional law as it is conventionally understood. For example, the UK does not have a codified constitutional text with norms that can easily be applied to the labour relationship. It is unnecessary for this thesis to argue why that is deficient; suffice to say that plenty of constitutional norms nevertheless find their way into labour law cases: for example, *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch). Of course, it is possible for rules of a constitutional nature to be found in legislation or even convention, but there are good reasons for these to be entrenched in codified constitutions. A full exploration is beyond this thesis.

[8] The term is Barber's: see below for more.

domination by employers over workers,[9] in such respects as would threaten the ability of workers to function as citizens in the political sphere. Chapter 4 has touched on this risk already, but it is worth setting out the threat posed to workers as citizens in more detail before moving on to the practicalities of how constitutional labour law can offset this threat. There has long been a fear among elites, including the liberal bourgeoisie, that the working class would be unable or unworthy to participate in democratic politics, and thus must be denied the benefits of citizenship. Indeed, as Marx acerbically remarked of liberal revolutionaries, 'scratch a *citoyen* and you will always find a *bourgeois*'.[10] This rests on three elite assumptions about the reality of working-class life. First, workers who live in poverty would use any political power they obtained simply to effect material redistribution. On the one hand, this might reflect pure material self-interest on the part of elites themselves. But a slightly more sympathetic view held that the desperation of the working class would demand poverty alleviation *immediately*, to the detriment of long-term economic and political stability. Arendt, for example, explained the success of the American Revolution as compared to the French Revolution in building a viable political settlement by reference to the former's focus on institutional development; the latter being swallowed up by (well-meaning but, in her view, misguided) concern for the material plight of the working class.[11] The argument is that poor, hungry people care little for procedural

[9] That workers are at risk of such domination is taken as given. The nature and source of such domination has been much discussed. For a sample, see: Richard Dagger, *Civic Virtues* (Oxford University Press 1997) 161-62; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 582-84, 588ff, and *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 9, 47, 57, 65ff, 80-82, 85-87, 99, 127; Dana Villa, *Public Freedom* (Princeton University Press 2008) 72, 88, 112-118, 127 248, 260, 275; Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225; Philip Pettit, 'The Market as a Res Publica' in Stuart White and Niki Seth-Smith (eds), *Democratic Wealth: Building a Citizen's Economy* (openDemocracy 2014) ch 1; Jessica Kimpell, 'The Commercial Republic: A Contradiction in Terms?' in the same volume, ch 2; Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015); Elizabeth Anderson, *Private Government* (Princeton University Press 2017).

[10] As cited in Dana Villa, *Public Freedom* (Princeton University Press 2008) 13. Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 79 observes: 'One might be forgiven for concluding that liberalism is the *bête-noire* of labour law.'

[11] As explained in Dana Villa, *Public Freedom* (Princeton University Press 2008) 342ff. Villa recites Arendt's view that attempts to alleviate poverty doomed the French and Bolshevik revolutions to political instability and ultimate demise, because they were unable to build 'a new and durable public realm' with robust political institutions; whereas after the American revolution, the new state was '[f]reed from the crushing burden of Old World poverty' (because of slavery on the one hand and farmland confiscated from indigenous peoples by genocide on the other), and so could devote its attention to the development and entrenchment of political institutions instead. For more, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) ch 1; Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 33–34.

nicety and institutional form, and political systems under pressure to care for lots of them are unlikely to remain stable and democratic.[12]

Second is the argument that impoverished workers do not have the education levels to make informed decisions in the greater good. Nor do they have the time to acquire necessary information (because they are too busy working, or too tired after work). They are thus easily misled by demagogues or otherwise make bad political choices. Conversely, it was argued that *in order for* citizens to take part in politics (attend town meetings, campaign for office, debate affairs of state in coffee-houses), there must be someone else (slaves or peasants) working to provide the citizen with income.[13] As Aristotle argued, 'leisure is needed both to develop virtue and to engage in political actions'.[14]

These arguments hint at a connection between workers' material conditions and their ability to function as citizens. This thesis will not devote much more space to this issue. King and Waldron have already explored the complicated relationship between material wealth and citizenship,[15] arguing that a welfare state is necessary to enable people to fully participate in society and as such is an entitlement of modern citizenship. This thesis does not demur from this conclusion, but it wants to focus on the third objection to working class enfranchisement, which constitutional labour law is particularly apt to address.

This is the argument that working for a living leads to adjusting one's political and personal beliefs and actions to suit the preferences of another. Liberal reformers have recognised that individual workers may come under too much pressure from their employers to exercise their own political judgment.[16] Aristotle proclaimed that 'You could no more make a city out of paupers than out of slaves'.[17] Time spent at work 'debase[s] the mind' because

[12] See Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 76.
[13] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 37.
[14] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 25. See also Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 271.
[15] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.
[16] Dana Villa, *Public Freedom* (Princeton University Press 2008) ch 5.
[17] Aristotle, *The Politics* (Stephen Everson ed, Cambridge University Press 1988), reported by Jeremy Waldron, 'Property and Ownership' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition) <https://plato.stanford.edu/archives/sum2020/entries/property/> accessed 12 July 2021.

workers get used to being 'subject to orders'.[18] We have seen in Chapter 4 that citizens need to be politically independent of one another – able to bring their own preferences, beliefs and judgment to bear on decisions in which they participate, without fear nor favour towards another person. Economic dependence, and the habit of following instructions, compromise the political independence and 'contestatory mindset' necessary for citizenship.[19]

On both sides of any interaction or relationship, citizens must interact with one another from a mindset of what Anderson calls 'democratic equality':

> [E]galitarians seek a social order in which people stand in relations of equality. They seek to live together in a democratic community, as opposed to a hierarchical one… To stand as an equal before others in a discussion means that one is entitled to participate [and] that no one needs to bow and scrape before others…[20]

There is a long history of various connections between equality in the workplace and democratic citizenship – for example, the civil rights struggles of Black people in the USA and the Catholic-Nationalist community in Northern Ireland had a prominent place for labour issues.[21] But we need to be careful not to overstretch ourselves in this thesis. Equality is a huge philosophical and legal issue, which would be beyond the scope of this thesis to discuss in any great detail. We should therefore focus on a particular kind of equality. In keeping with Bagenstos and Anderson,[22] this thesis does not claim that constitutional labour law should aim at material redistribution, but rather that there are 'certain areas of life in

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[18] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 25.
[19] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 237.
[20] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 313. Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 232 uses the term 'social equality' for the same idea: 'regardless of the various material inequalities that are pervasive and may be inevitable – each of us deserves to be treated as an equal member of our community. We each are thus equally entitled to participate fully in the public life (political and civic) of our democratic republic.'
[21] 1963 saw the 'March on Washington for Jobs and Freedom' at which Rev Dr Martin Luther King delivered the 'I Have a Dream' speech; various campaigning literature produced by the Campaign for Social Justice and the Northern Ireland Civil Rights Association refer to discrimination in employment, particularly in the public sector: see the collection collated by the University of Ulster at <https://cain.ulster.ac.uk/events/crights/source.htm> accessed 24 June 2022.
[22] Which is not to say that theories of social or democratic equality do not have something to say about material distribution at all: see Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 320.

which financial inequalities should not be allowed to replicate themselves (in other words, in which commodification should be limited or barred). One involves activities of democratic participation and access to the government.'[23]

Anderson expressly links her vision of 'democratic equality' to the sort of citizenship we have discussed in earlier chapters.[24] She also considers its implications in 'a system of co-operative production',[25] arguing it requires 'interpersonal justification' in productive decision-making.[26] That is to say, people who make decisions in productive matters must be able to give reasons for those decisions that will count as a good reason when explained to anyone else involved in the productive process – such as a worker.[27] This is necessary, King and Waldron argue, for social relations to move from class-based to citizenship-based.[28] Elsewhere, Waldron has explained how a democracy is undermined by 'rigid class structures' and that the phrase 'second-class citizen' is always deployed as a 'reproach' against a state.[29] It works as rhetoric precisely because it is oxymoronic: a democratic society that claims to be based on (pervasive, equal) citizenship cannot tolerate 'classes' of citizens.

Nowhere is class exposed more fiercely than in the context of labour relations; therefore, we can use class dynamics, and their impact on law and politics, as a benchmark by which to judge a state's commitment to the ideal of democratic equality demanded by citizenship. Labour relations unconstrained by constitutional labour law have the capacity to undermine democratic equality, and other aspects of citizenship. As stated above, economic dependence within a hierarchy has a tendency to erode political independence. The labour

[23] Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 236. Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 163 uses the term 'political equality' to mean broadly the same thing: 'Enjoying rights equally within the institutional framework to which we are subject [as] an indispensable part of any well-functioning, inclusive deliberative process, nationally and supranationally.' She also invokes the idea of 'public autonomy' (135), on which more below.

[24] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 317. See also Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 163ff.

[25] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 321.

[26] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 322-23.

[27] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 322, drawing on GA Cohen, 'Incentives, Inequality and Community' in Stephen Darwall (ed), *Equal Freedom* (University of Michigan Press 1995).

[28] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, in particular 422-23.

[29] Jeremy Waldron, 'Citizenship and Dignity' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013) ch 18, 334.

relationship, as one of inherent hierarchy and authority, undermines democratic equality in both directions: not only might workers adjust their political and social activity to suit the preferences of employers and managers, and accrue a habit of deference, but the latter may no longer regard their workers (and the working class generally) as *concitoyens* to be trusted and co-operated with. Not only are workers excluded from political life, but employers' political power is increased:

> [A]n employer is using its economic power over its employees as leverage to obtain greater power in the political sphere. Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse, in which employers' voices are amplified and workers' are squelched.[30]

Likewise, Gourevitch says:

> …because workers were dependent on their employers, they would be an extension of that person's will, thereby undermining the political equality required for a free republic… [a worker] soon loses all independence of mind, and yields himself to the views, the wishes, and desires of the individual from whom he received his bread…[31]

In Chapters 9 and 10, we will encounter some examples of employers explicitly using their economic leverage and managerial authority over their workers (and indeed the leverage of 'the business community' over the working class generally) to pursue overtly political ends, including compulsory attendance at political rallies,[32] and 'persuading' people to vote to overturn a specific labour-protective law.[33] It is worth repeating the warning from Chapter

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[30] Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 256.
[31] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 76.
[32] Meghan Keneally, 'Miners angry they were "forced" to go to pro-Romney rally and docked a day's pay... as bosses say event was "mandatory but they didn't have to attend"' (*Daily Mail*, 3 September 2012); Grant Stern, 'Pittsburgh plant workers just revealed they had to go to Trump's rally or go without pay' (*Washington Press*, 16 August 2019); Gideon Cohn-Postar, 'A Shell plant coerced workers into attending a Trump rally. Here's what that means for democracy.' (*The Washington Post*, 2 September 2019).
[33] American Economic Liberties Project, 'Prop 22 is an Egregious Display of Corporate Power' (4 November 2020) <https://www.economicliberties.us/press-release/prop-22-is-an-egregious-display-of-corporate-power/>; Andrew J Hawkins, 'Uber and Lyft Had an Edge in the Prop 22 Fight: Their Apps' *The Verge* (4 November 2020) <https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications> links accessed 27 June 2022. It is worth noting that the future of this measure is in

4 that the public life of a citizen is not merely confined to voting – and thus, examples of employers influencing their workers' voting patters, though egregious, is not the only thing that needs to concern us. More subtle political influence is equally worrying, especially if it stymies independent moral formation (on which more in Chapter 9) and democratic deliberation.[34] This includes the exercise of other rights, like sexual expression, family formation or religious worship, which may not seem overtly political, but may demonstrate one's moral or social views and potentially offer an example to others: 'the very practice and claiming of rights in the public sphere… is an integral part thereof… [They are] preconditions of reasonable discourse in the public sphere'.[35]

Of course, the effect of any particular worker's experience on their activities as a citizen is likely to vary according to a range of factors: how well-paid they are, how much time they have for education and public engagement, the extent to which their work involves travel, the diversity of the workplace, *etc*. Often, ill-treatment at work *galvanises* workers to become more active citizens, as we saw in Chapter 3. These contingencies aside, there are reasons to believe that working life tends to produce disempowering and depoliticising effects for many workers.

Some scholars have examined the question of to what extent domination and depoliticisation are contingent on particular economic models of labour relationship – for example, employment rather than self-employment. It is beyond the scope of this thesis to engage with that debate, but some of the literature is cited below.[36] As will be demonstrated in the doctrinal section, constitutional labour law is capable of applying in various kinds of labour relationship, enjoying an expanded personal scope.

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doubt: see Margot Roosevelt and Suhauna Hussain, 'Prop 22 is ruled unconstitutional, a blow to California gig economy law' *LA Times* (Los Angeles, 20 August 2021).

[34] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 164-65.

[35] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 164-65.

[36] Aodh de Blacam, 'An Outline of Distributivism' (1944) 72(846) The Irish Monthly 430; Michael Sandel, *Democracy's Discontent* (Harvard University Press 1996) ch 6; Guy Standing, *The Precariat* (Bloomsbury 2011); Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015); Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 56-59 and sources cited therein; Jan Lucassen, *The Story of Work: A New History of Humankind* (Yale University Press 2021); Anthony M Annett, *Cathonomics: How Catholic Tradition Can Create a More Just Economy* (Georgetown University Press 2022), in particular ch 5.

From theory to constitutional labour law

This section will begin to sketch the legal content of a constitutional labour law based on citizenship. In so doing, it will grapple with the problems of waiver and horizontality, and the balancing and adjustment of rights.

Participation

The argument of this thesis is not for the abolition of authority within the workplace, but for its constraint. The goal is to prevent the dependence and hierarchy inherent in the employment relationship from assuming broader socio-political salience. Nor is this thesis arguing for the dissolution of private ownership over productive property.[37] Rather, it follows Gourevitch in arguing that political 'independence of each citizen' must act as a 'constraint' over property.[38] More to the point, the legal powers of property owners must be interpreted in light of a theory of constitutional labour law that places citizenship at its heart. In this way, constitutional labour law does inescapably challenge property *rights* (in the sense of control over productive activity),[39] even if it has little to say about property itself. Chapters 6 and 7 advocate rights of participation for worker-citizens in the administration of production that challenge the property-based control rights of employers. Chapter 8 will extend that to encompass participation in subsidiary regulatory institutions where workers and employers can bargain on a sectoral basis. Participation must be guaranteed at work and in the broader economy so that worker-citizens can acquire the 'habits of democracy' and employers learn to treat them with appropriate respect. Bogg recognises both of these dimensions. First, he says: 'Empowering citizens to take charge of their collective fates gives citizens the opportunity to learn the practices of deliberative governance. Only then can the promise of effective political agency be fulfilled.'[40]

[37] Although there may be other reasons not derived from the model of citizenship underlying this thesis for such a policy. Here is not the place to consider the nature and moral foundation of property rights: for more, see Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021).
[38] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 80.
[39] As Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48, 59 puts it, we should be 'skeptical about deriving rights to govern other people from private property in land or capital.'
[40] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 131.

Elsewhere, he speaks of how the state must prevent 'civic friendship' between citizens degenerating into 'corruption'.[41]

Political independence

Outside the workplace, constitutional labour law restrains the tendency of capitalism towards plutocracy[42] in the following way: it is not enough to grant formal political rights to workers in order that citizenship be pervasive and thus the state democratic, but workers must be protected against undue influence by employers in their exercise of those rights.[43] They must be able to bring their own interests, opinions, preferences and judgment to bear on political and social affairs and activity, rather than that of their employer. For their part, employers are to be restrained from exercising undue influence over such rights and activities, even in circumstances where workers seemingly consent to the arrangement. In that recognition of the double-threat lies the beginning of the answer to the waiver problem, that will be elaborated below.

Aristotle was right that one cannot build a democratic state out of slaves, nor out of workers who (although not chattel slaves) are subject to domination by their employer. That way plutocracy looms, and the capture of the state by the wealthy and powerful. The solution, however, is not to disenfranchise the working class, but to protect their political independence from employer influence.[44] As such, Chapters 9 and 10 will demonstrate why and how to protect civil liberties in the workplace.

Practicalities of constitutional labour law

Enshrining participation and political independence within constitutional labour law generates profound challenges that must be overcome in order to adequately protect workers' citizenship. This section will look at the practical implications of this theory of constitutional labour law: beginning with what it says about the role of the state in labour

[41] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 120.
[42] Dana Villa, *Public Freedom* (Princeton University Press 2008) 42.
[43] Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48.
[44] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 76-77.

relations, and then moving on to considering the nature and effect of constitutionalisation in this context.

The role of the state

A state is defined, at least in large part, by its constitution. The protection of workers' rights at a constitutional level, and the integration of workers into the body politic, is a statement about the nature of the state itself. Most states within the constitutional tradition discussed in this thesis have long histories of hostility towards organised labour and working-class political activity.[45] Constitutional protection of workers from the threat posed to their interests by capital (which, it should be recalled, is increasingly globalised in nature) recognises a fundamental claim by workers over the state.[46]

All protective labour law lends the power of the state to the side of workers in their conflict with capital. Labour has long appreciated that they benefit in this struggle by having the power of the state on their side (although divisions have always arisen over whether such state support is necessary, or likely).[47] Conversely, the labour movement knows only too well the danger of a state controlled by capitalist interests. Constitutional labour law takes the claim further: having state power on the side of workers is not a contingent and transient political victory, but a claim to 'ownership' of the state itself. The state does not merely protect workers because they have exercised their political rights of citizenship to move policy in that direction; rather, the state protects workers because doing so is necessary for them to exercise citizenship rights at all.

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[45] See William A Pelz, *A People's History of Modern Europe* (Pluto Press 2016). For something closer to home, see James Connolly, *Labour in Irish History* (8th edn, New Books Publications 1983).

[46] Chapter 3 nodded to the historic claim that 'labour built the republic, and labour shall rule it' (sign at the first US Labour Day Parade in New York City (1882); see Krystal Ball, 'Rising: 65% of Americans Approve of Labor Unions as Economy Implodes' *The Hill* (Washington DC, 8 September 2020) <https://www.youtube.com/watch?v=tdJhuv3idm8> accessed 15 September 2020. The same claim is captured in these lines from Ralph Chaplin, 'Solidarity Forever' (1915): 'It is we who ploughed the prairies, built the cities where they trade; / Dug the mines and built the workshops, endless miles of railroad laid / … / All the world that's owned by idle drones is ours and ours alone. / We have laid the wide foundations; built it skyward stone by stone. / It is ours, not to slave in, but to master and to own / While the union makes us strong.'

[47] We encountered this division in Chapter 3: the syndicalist tradition tends to favour 'direct action' against employers using industrial might alone; the political tradition inclines towards the capture and deployment of state resources.

It is important to recognise that constitutional labour law is not just in the interests of workers. Once we understand the nature of the democratic state as one which has a particular kind or relationship with its population that we call 'citizenship', we realise that it is in the interest *of such a state itself* to protect that relationship through constitutional labour law. Of course, there are various ways of understanding the 'interest' of any individual state – from an economic or geopolitical perspective, for example.[48] However, when Barber talks about the 'purposes of the state', we can appreciate that different kinds of states have interests *qua* those kinds of states.[49] We might dispute whether it is in the 'interest' of a state from a particular economic or geopolitical perspective to be democratic; but once a state commits to being democratic, or holds itself out as a democracy, we can see how it is then in the interest of that state to protect its democratic system from degenerating into some other form of government.[50] Given the risk inherent in the labour relationship under capitalism that workers will be either unable to function as citizens, or will fall into a 'retinue' that enhances the power of their employers, we can see how a democracy without constitutional labour law could degenerate into plutocracy.[51] We should also observe that states need the *loyalty* of their citizens to survive.[52] Integrating workers into political decision-making and recognising their legitimate claim to share in the 'ownership' of the state at a level which speaks to the nature of the state itself (*ie*, the constitution) is likely to generate the kind of loyalty necessary for the state to rely on citizens shouldering the responsibilities and duties of that office.[53]

By now it is clear that the state should be concerned about domination in the workplace for reasons of constitutional stability,[54] and that therefore protecting workers from threats to their citizenship is a matter of constitutional concern. It not only enhances democracy, but also the integrity of the state. This is why many republican writers focus on the labour relationship as a particularly acute area of *dominium* the state should aim to reduce,[55] and

[48] For discussion, see Tim Marshall, *Prisoners of Geography* (Elliott and Thompson 2015), and *The Power of Geography* (Elliott and Thompson 2021).
[49] NW Barber, *The Constitutional State* (Oxford University Press 2010) ch 3.
[50] NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) ch 6.
[51] Dana Villa, *Public Freedom* (Princeton University Press 2008) 42.
[52] NW Barber, *The Constitutional State* (Oxford University Press 2010) 52.
[53] As Pettit argues, subjugation breeds resentment: see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 63.
[54] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 131.
[55] See, for example, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997) 5, 48, 77-78. At 141ff, Pettit expressly appeals to 'socialists' by critiquing 'wage-slavery', embracing collective action and bargaining, and rejecting pure contractualism in labour relations.

there is a burgeoning body of literature that seeks to justify both collective and individual labour protections on the basis of republican theory.[56] The insights of this and the previous chapter illustrate that this approach is particularly useful in respect of constitutional labour law, which is designed to emancipate workers to behave as citizens by participating freely in political and civic-social life. Before Part III sketches a programme for constitutional labour law doctrine, we need to examine the precise implications of *constitutional* intervention in the labour relationship, in the context of those questions left at the end of Chapter 2.

Benefits of constitutionalisation

We have thus far established that states ought to protect the ability of their citizens to function as such, if they are to remain democratic rather than plutocratic. We have recognised the threats latent within the labour relationship towards the ability of workers (particularly, though not exclusively, employees) to function as citizens. So states need to intervene in the labour relationship, and it is appropriate that the state's constitution makes provision for such intervention. This section will assess what that means for our outstanding problems of waiver (and the ability of constitutional labour law to override other kinds of rules), horizontality, balancing and selectivity. The first of these is the most important and will receive the greatest attention, not least because some of the insights therein will suggest answers to the others.

1. *Entrenchment*

Talk of constitutionalisation inevitably leads us to think about entrenchment. Indeed, in some literature, constitutionalisation is synonymous with making it more difficult (or

[56] See, for example: Nien-hê Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31(1) Social Theory and Practice 115; Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151; Iñigo González-Ricoy, 'The Republican Case for Workplace Democracy' (2014) 40(2) Social Theory and Practice 232; Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31(2) Social Philosophy and Policy 48; David Cabrelli and Rebecca Zahn, 'Civic Republican Theory and Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 6; Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in the same volume, ch 13. For a summary, see Dáire McCormack-George, 'Well-Being, Skills and Work in a Neorepublican EU: The Case of Third-Country Nationals' (PhD thesis, Trinity College Dublin 2020) 65ff, 79.

impossible) to change or repeal a law.[57] More specifically, it is most often associated with making it more difficult to change a law *by legislation*. This comes with a fear (or hope, depending on the theorist) that determining the scope of a law will fall exclusively to the judiciary.

A distinction should be drawn between 'constitutional' labour law and 'constitutionalised' labour law. All sorts of laws may be *constitutionalised* in this sense of protected against legislative change (at least in most jurisdictions). We have already explored, however, why labour law is *constitutional* insofar as it is appropriate for the constitution (which establishes offices of the state and determines the distribution of power between them) to deal with at least some aspects of the labour relationship. Of course, it is open for any given polity to address this distribution by means of legislation that is not entrenched. But our earlier discussion yields the conclusion that not only is the labour relationship an appropriate subject for regulation at a constitutional level, but there are good reasons to do so, in the interests of both workers and the state. In any event, it is vital to recognise that even if there are no labour rights in a constitution or other human rights document, there will inevitably be constitutional labour law – because any worker-protective legislation will be subject to challenge by employers on such grounds as the right to private property, or freedom of contract or to run a business. The theory developed in this Part is not just one used to interpret 'freedom of association' or some other worker-protective right (that may or may not be found in a constitution): it should also be used to understand the legitimate aim served and proportionality of the means employed in interfering with rights of employers to protect workers' interests. Moreover, it helps us to understand labour regulations not as interferences at all, but as 'market-constituting'.[58] Furthermore, it bears repeating that constitutional labour law is about more than rights: as Irish experience has shown, we need a theory to address questions about the delegation of legislative and judicial

[57] See, for example, Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014).

[58] For more on this distinction, see: Wolfgang Streeck, 'Beneficial Constraints: On the Economic Limits of Rational Voluntarism' in J Rogers Hollingsworth and Robert Boyer (eds), *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge University Press 1997), and *Re-Forming Capitalism* (Oxford University Press, 2009); Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford University Press 2005); Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development' in Shelley Marshall (ed), *Promoting Decent Work: The Role of Labour Law* (Monash University 2010) 110; Eric Tucker, 'Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?' (2010) 39(2) Industrial Law Journal 99; Maayan Menashe, 'The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory' (2019) 40(1) Oxford Journal of Legal Studies 53.

power to dedicated labour institutions, and the participation of trade unions in the public regulation of conditions of employment and the economy more broadly.[59]

Notwithstanding the above, it is clear that entrenchment must be entailed by constitutional labour law. Constitutional protections of workers' interests will function as 'trumps': yes, over legislation that is inimical to those interests in a disproportionate way, but more importantly, over at least some provisions of employment contracts. Here is where we get to the question of to what extent can constitutional and human rights override private contracts of employment, or conversely, can workers 'waive' their rights by contract?

(a) Waiver

The question of waiver, or 'derogability', underlies all of labour law, not just constitutional labour law.[60] It is not generally possible for parties to an employment relationship to 'contract out' of minimum wages, maximum working time, health and safety and various other employment regulations.[61] As such, as we saw in Chapter 3, labour law is generally characterised as an interference with freedom of contract. The justification for such interferences was also examined in Chapter 3: the need to overcome the inequality of bargaining power that led to the contract being adopted in those terms. The state can take two approaches to shoring up workers' bargaining power: procedural (support for trade unions and collective bargaining to equalise the negotiation process) and substantive (remove some things from bargaining altogether, or at least provide a floor for negotiations).

[59] See, for example: *John Grace Fried Chicken v Catering Joint Labour Committee* [2011] IEHC 277; *McGowan v Labour Court* [2013] IESC 21; *Náisiúnta Leichtreach Contraitheoir Éireann v Labour Court* [2020] IEHC 303; [2020] IEHC 342; [2021] IESC 36; *Zalewski v Workplace Relations Commission* [2021] IESC 24.

[60] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482. See also Vladimir Bogoeski, 'Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2022) Industrial Law Journal <https://doi.org/10.1093/indlaw/dwac020> accessed 8 August 2022.

[61] Although some labour legislation allows for contracting out by collective agreement: see, for example, Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, article 17(2). This will not be considered further here.

Three criticisms of this approach to the waiver problem have been identified in the literature.[62] First, while inequality of bargaining power is certainly widespread in a capitalist economy, it is not necessarily true of any particular worker. Some people have rare or even unique skills, and some businesses or industries face dramatic labour shortages at various times. Bargaining power tends to depend on background economic conditions and personal circumstances, which on their face are distinct from the labour relationship itself. As such, an 'inequality of bargaining power' approach to non-derogable labour law is condemned as too contingent, even arbitrary. Second, 'inequality of bargaining power' in itself is normatively inert.[63] All kinds of market actors face transactions in which they have varying degrees of relative bargaining power. In order for this to be a useful way to think about labour law, we need further theorising to tell us why it matters that *workers* have less bargaining power than *employers*, and in respect of which aspects of the labour relationship that inequality matters.

Third, and most importantly for present purposes, this approach to labour law is criticised as paternalist.[64] Not only does the approach assume that workers have low bargaining power (as critiqued above in respect of the contingency objection), but it also assumes that if there *were not* inequality of bargaining power, workers *would have* bargained for the various provisions set out in labour law. There might be reasons to doubt that is the case for every worker, particularly when it comes to the trade-offs that might be available. Although workers with families or thriving social lives might prefer not to work more than forty-eight hours *per* week, a recluse might prefer higher pay. Those afflicted by wanderlust might like extra annual leave, where homebirds have little interest. And more specifically in the sphere of constitutional labour law (as will be discussed further in Part III), those workers who are already apolitical might quite happily bargain away some freedom of expression, and the atheist could exchange religious accommodation for higher wages. But really, non-derogable labour law is not just saying if workers *could* bargain for this, they *would* – the law is saying this is what they *should* have.

[62] Unless otherwise indicated, the below is taken from Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482; David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159.
[63] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 7, 110.
[64] See the literature surveyed in Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482; David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159.

There might be good reasons for labour law to be paternalist, even in the absence of any inequality of bargaining power.[65] The labour relationship (like many transactions) is beset by information asymmetries and other cognitive biases.[66] For example, a worker taking a job is likely to underestimate the risk that he may face disciplinary proceedings, and so might not care about contractual terms providing for fair procedures. We do not always know in advance what political or religious affiliations we will develop. We may not anticipate developing a disability, or a change in our family status. More broadly, the employment contract is 'incomplete by design'[67] – so we cannot know what decisions our employer might make in future with which we disagree or that negatively affect our interests.

Quite apart from information asymmetries and deficiencies, labour theorists have long been aware of the problem of 'false consciousness' – or in less Marxist parlance, 'adaptive preferences'.[68] Just as our bargaining power is in part determined by background economic and personal circumstances, so too are our expectations, hopes and desires. There is ample support in the literature that this problem is particularly acute in respect of trade union and collective bargaining rights – in most industries, in most countries, unions are so weak that workers (a) see no evidence of the benefits of unionisation, and / or (b) anticipate retaliatory action by employers for union activity and industrial action.[69] As such, they may see no

[65] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 490ff. Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015), and Michael Sandel, Democracy's Discontent (Harvard University Press 1996) both discuss different ways of thinking about 'freedom' in the context of labour. Sandel argues that the law is justified in overriding the 'voluntarist' conception (by interfering with freedom of contract) in order to protect the 'civic' conception (roughly the sort of political independence we have been discussing).

[66] Gali Racabi, 'Abolish the Employer Prerogative, Unleash Work Law' [2021] SSRN Electronic Journal <https://www.ssrn.com/abstract=3800910> accessed 19 May 2021.

[67] Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48(4) Industrial Law Journal 515, 521, citing Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000).

[68] David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159).

[69] David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159; Gali Racabi, 'Abolish the Employer Prerogative, Unleash Work Law' [2021] SSRN Electronic Journal <https://www.ssrn.com/abstract=3800910> accessed 19 May 2021. A recent high-profile example that grabbed the world's attention was the struggle for unionisation at various Amazon distribution ('fulfilment') centres in the USA, which ultimately won some victories (though at time of writing these remain precarious): see Luis Feliz Leon, 'The Rank-and-File Organizers Who Took On Amazon' *The American Prospect* (Washington DC, 5 April 2022); Harold Meyerson, 'What Amazon Will Do Next. What Unions Must Do Next.' *The American Prospect* (Washington DC, 7 April 2022). There is interesting data from the Ireland in this regard: 44% of non-unionised workers would vote to establish a union in their workplace (37% opposed); this rises to 66% in favour among non-unionised workers aged 16-24

particular reason to bargain for union rights. More broadly, workers who have never enjoyed the right to participate in management decisions may see no reason to negotiate participatory structures in their workplace. The conditions of one's previous job inevitably shape one's expectations for the next – from wages and hours to management attitudes. The same is true for conditions of other workplaces in the same industry. This can create a negative feedback loop where the downgrading of one group of workers' conditions leads to other workers adjusting their demands in relative terms.[70] Where trade-offs are concerned, a party to a contract might genuinely and freely consent to a particular term – but only because the other option(s) were worse. 'Consent to an option within a set cannot justify the option set itself.'[71]

Nevertheless, the paternalist objection persists. False consciousness and information asymmetry might be just as contingent or normatively inert as inequality of bargaining power itself, and labour law is still insisting that workers should enjoy benefits they may not want (even deep down). Raz argues that as far as freely consenting adults are concerned, merely invoking someone's own interest is insufficient to justify restricting his freedom of choice: 'Such paternalism is only rarely justified'.[72] Partly, this is because while a given right may well protect a particular interest of a person, it could still be in someone's *overall* interest to surrender it:[73] for example, if employers in my city will only hire non-unionised workers, my overall interest may be better served by having a job than by having the right to freedom of association – even if the right to freedom of association nonetheless protects some valuable interest of mine. Conversely, someone else may have a much greater interest than the right-holder in something only the right-holder has a right to:[74] for example, a homeless person has a much greater interest in sleeping in an empty holiday home than the property-owner has in nobody using it while he is not there. Finally, individuals also have

(15% opposed); see John Geary and Maria Belizón, *Union Voice in Ireland* (University College Dublin, June 2022).

[70] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 494ff. Moreover, since most businesses face competition in the marketplace, 'good' employers who do respect their workers' rights at a cost, may be undercut by those that do not, and go out of business, thereby removing the example of a rights-respecting business from the 'consciousness' of workers and employers alike.

[71] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 61.

[72] Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 34.

[73] Joseph Raz, 'The Nature of Rights' in *The Morality of Freedom* (Clarendon Press 1986) ch 7.

[74] Joseph Raz, 'Rights and Individual Well-Being' in *Ethics in the Public Domain* (Oxford University Press 1994) ch 3.

an interest in being able to decide how best to serve their own interest.[75] Paternalism thus raises hackles.[76] In a liberal society, it would be helpful to ground labour law (in particular, constitutional labour law, which concerns fundamental issues of personal identity) on some non-paternalist basis. Thankfully, the theory developed in this thesis offers such a basis.

It should be flagged that 'revocability' of consent to the interference (that is, allowing workers to quit their job if they no longer consent) is not enough. Of course, revocability is the minimum we should expect, but it offers very little protection in practice.[77] For present purposes, the key problem is that workers will still have material incentives (even, depending on economic circumstances, obligations of necessity) to 'sell' their rights. Being legally permitted to 'buy back' rights later, by foregoing the material benefits of work, is insufficient protection for citizenship. That is why in recent years, the European Court of Human Rights has changed its jurisprudence to stress that a worker should not be obliged to quit his job to reassert his right to (for example) practise his religion; rather, the employer should be obliged to accommodate the practice of the worker (at least in certain circumstances, as Chapter 10 will show).[78] Of course, this is not only paternalist,[79] but also shifts some costs from the worker onto the employer.[80] As such, it is important to find some basis for this approach to constitutional labour law grounded in *public interest* considerations.

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[75] Joseph Raz, 'Rights and Individual Well-Being' in *Ethics in the Public Domain* (Oxford University Press 1994) ch 3, 49.

[76] The commonly-cited example is *Wackenheim v France* (2002) CCPR/C/75/D/854/1999 (UN Human Rights Committee, communication no 854/1999): the French prohibition on dwarf-throwing was defended (and upheld by the UN) on the basis that one's 'dignity' is inalienable. We have seen in Chapter 3 that a lot of labour law is dignitarian in nature, and understandings of dignity will flow through later chapters; however, setting out precisely what human dignity means and whether it should be treated as inalienable in a way that justifies paternalism is beyond the scope of this thesis. For discussion, see Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013); for a view of the relationship between citizenship and dignity to which this author subscribes, see Jeremy Waldron, 'Citizenship and Dignity' in the same volume, ch 18. See also the discussion of dignity in Chapter 4 of this thesis.

[77] For the reasons explained in Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482.

[78] See *Eweida and others v United Kingdom* Applications nos 48420/10, 59842/10, 51671/10 and 36516/10.

[79]

[80] By saying a worker is entitled to keep his job and the benefits that flow therefrom, *and* continue to exercise the right that he waived as a condition of getting that job, there appears to be a sort of 'unjust enrichment' of the worker. The employer might have placed reliance on that term of the contract.

(b) Public interest and non-convertibility

The strongest limit that can be imposed on the ability of a person to voluntarily consent to giving up certain rights arises out of the public interest in the continued existence of those rights.[81] Raz considers the existence of certain rights to be a 'common good': not only is it in the right-holder's own interest to have a right, but it is in *everyone's* interest that individuals have that right.[82] He gives the example of the right to vote: yes, I have an interest in voting, but this may be limited because it is unlikely my vote will make the difference in an election. Much more important is the interest everyone (including me) has in living in a democratic society.[83] Not only would the public interest be undermined if some people were denied that right, but it would be undermined if people could voluntarily give up their right; if people could sell their vote, or if contracts of employment contained clauses directing workers who to vote for, the democratic character of society would be imperilled – even if the individuals were adequately compensated, by their own lights, for giving up their right, and freely chose to do so because it was in their own interest. Raz puts it characteristically well:

> The right of free expression serves to protect the interest of those who have it and who may wish to use it to express their views. It also serves the interest of all those who may have an interest in acquiring information from others. But here again the right serves the interests of those who are neither speakers nor listeners. Everyone who lives in a democracy is affected by the fact that this is a society enjoying a free exchange of information… If I were to choose between living in a society which enjoys free expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option… This explains why civil and political rights which are the prize of the official culture of liberal democracies do not enjoy a similar place in the estimation of most ordinary people. Many people judge them by their contribution to their well-being, and it is not much. Their real

[81] Des Ryan and Gerry Whyte brought it to my attention that the public interest is used as a basis for overriding waiver in illegality situations. To this can also be added its use in declining to enforce terms in restraint of trade: for some discussion, see Christopher McMahon and Alan Eustace, 'Nothing to Lose But Their Restraints of Trade: Lessons for Employment Non-Compete Clauses from EU Competition Law' (Industrial Law Journal, forthcoming).
[82] Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27.
[83] Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 34.

> value is in their contribution to a common liberal culture. That culture serves the interests of members of the community.[84]

Frantziou concurs, arguing that the sort of rights we want to protect within 'private authority relationships' like the workplace are 'important claims about how [the] community can be *legitimately* governed', 'legitimating conditions' for the state itself, irrespective of the putative consent of individual workers.[85] It is part of 'the common good within a shared polity'[86] that workers possess such rights as are necessary for them to act as citizens under the sort of conditions of democratic equality we discussed above. As such, a court should not approach a question of the scope of rights in the workplace as one of balancing different (perhaps conflicting) *individual interests* – rather, it should examine 'the nature of the protection of [the right] as an element of a democratic society'.[87] It should not ask whether the infringement of the right is a 'private harm' but whether protecting it serves a 'public good'.[88]

Rights like this are properly considered 'non-convertible' – if they could be sold or otherwise surrendered, the public interest in their existence would be undermined.[89] There would be none of the benefits of 'living in a democracy' to society of giving people a right to vote in the first place if their votes could be sold: those votes would be bought up by the rich and powerful, so the society may as well be a formal plutocracy.[90] Crucially, this is the case even if not every worker wants to sell his vote, because the employers buying up the votes become more powerful *relative* to the workers who keep their votes. There is no reason to limit this principle to voting: all the rights that are necessary for active participatory citizenship should be non-convertible. Of course, not every right can be of

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[84] Joseph Raz, 'Rights and Individual Well-Being' in *Ethics in the Public Domain* (Oxford University Press 1994) ch 3, 54.
[85] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 15, 22-27, 57.
[86] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 18.
[87] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 125-28.
[88] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 126-29, citing Joseph Weiler, 'The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12(1) International Journal of Constitutional Law 94.
[89] Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 34. See also Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 110.
[90] For another perspective on this issue, see Vladimir Bogoeski, 'Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2022) Industrial Law Journal <https://doi.org/10.1093/indlaw/dwac020> accessed 8 August 2022.

this character – for example, it would defeat the purpose of property rights if they were *not* convertible. But with respect to many rights, the public interest in the existence of that right might be undermined to a greater or lesser extent if right-holders can surrender it.

We can also consider the respecting of workers' rights citizenship to be part of the *duties* of citizenship on the part of *employers*.[91] Anderson argues citizens have obligations (of citizenship) to respect the 'social conditions of freedom' (rights of citizenship of others) that exist independently of whether the counterparty, at any particular point in time, actually desires that particular right.[92] As such, even if someone wants to waive a particular right at a particular time, and agrees to a contract of employment in such terms, the employer is forbidden from relying on that waiver in the relationship between the two citizens. Frantziou characterises this as a trade-off between 'private autonomy' and 'public autonomy, in the sense of the ability to participate equally in public life'.[93] Constitutional labour law is inevitably more concerned about the latter, because the exercise of public autonomy, and the conditions that safeguard it, structure the distribution and exercise of power in society – in ways that affect everyone, not just the parties to any particular employment contract. We saw earlier how the labour relationship poses a two-way threat to citizenship (diminution of workers' political power and inflation of employers'). We can counter that threat by thinking about constitutional labour law in two ways: as protecting workers' rights from sale, and imposing duties on employers not to purchase.

Various writers offer ways of figuring out which rights should be non-convertible and which should be capable of waiver.[94] However, it is again better to think of this in terms of degree: there are various factors we should consider in deciding how *much* a contractual obligation can interfere with any particular right. In deciding if any given contractual

[91] As Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 319 puts it: 'The rationale for establishing such inalienable rights might seem difficult to grasp from the point of view of the rights holder… Isn't it paternalistic to deny her the freedom to trade? We can avoid this thought by considering the point of view of the obligation holder. The counterpart to an individual's inalienable right to the social conditions of her freedom is the unconditional obligation of others to respect [them]… This implies that there are some things one may never do to other people, such as enslave them, even if one has their permission…'

[92] Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109(2) Ethics 287, 329. This she distinguishes from merely satisfying the *preferences* of another, which (she says) is not an obligation of citizenship.

[93] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 135.

[94] See, for example, Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 165-67.

obligation is justifiable and thus enforceable, or whether an employer should be entitled to rely on a breach of that obligation as reason to sanction the worker, we should take into account the impact on other people of that obligation being upheld. This could mean a worker's dependants or social circle,[95] other workers, who will be 'undercut' by one of their colleagues giving up a right or there being other workers out there who will,[96] and society at large (including political institutions).[97] Davidov refers specifically to the taxpayer bearing the cost of providing for workers with very low wages, or who are injured in an unsafe workplace,[98] but in the context of constitutional labour law we can broaden our scope of the social harms that arise when workers waive certain rights. If we have a 'social goal' of living in a democracy, 'individual waivers will undermine this goal'.[99] To the extent that they do, we can strike them out of contracts of employment, even when they have been freely agreed to by the parties.

This is, as Bogg puts it, a 'non-individualistic conception of liberal rights'.[100] But its basis can be easily located in the source of those very rights: citizenship. As an office of the state, 'citizenship [is] not up for sale'[101] – or to coin a phrase, citizenship is not a commodity. It is an insult to the rest of society, who want to live in a democracy, not a plutocracy, when a worker sells his citizenship to an employer (especially, but not exclusively, when he is compelled to do so by economic need).[102] It is a more grievous insult still when an employer presumes to buy it, when he takes steps to amass a retinue that would increase his own political power at the expense of not just his workers, but of all of us. As such, the labour relationship is not entirely private to the parties: insofar as it affects the ability of workers to function as citizens, it affects all of us. Insofar as it imperils democracy, it affects the nature of the state, and so the constitution that defines the state must take account of that relationship.

[95] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 494.
[96] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 495. See also Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 110.
[97] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 167.
[98] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 495.
[99] Guy Davidov, 'Non-Waivability in Labour Law' (2020) 40(3) Oxford Journal of Legal Studies 482, 496.
[100] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 113.
[101] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 110.
[102] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009) 111.

2. *Horizontal effect*

The preceding section has discussed how constitutional labour law will act to constrain private contracts of employment. Of course, this necessarily implies that constitutional labour law will have horizontal effects. We saw in Chapter 2 that in some jurisdictions, the idea that human rights could bind private parties is extremely controversial. In other jurisdictions, like Ireland, it might be routine in practice but woefully under-theorised.[103] The previous section explained that because the private employment relationship has effects on other people beyond that relationship (and for the nature of the state itself), particularly where it affects the ability of workers to function as citizens, we cannot take for granted the terms of a contract governing that relationship, even where these are freely agreed to by the parties. But that does not fully explain how to think about 'horizontal rights' in the context of a constitutional structure. This thesis does not seek to justify horizontality *per se*. Its specific focus is on constitutional labour law.[104]

The key to this thesis' understanding of horizontality is the insight that the citizen is an office of the state.[105] We stressed earlier that in order to function as a citizen, in order to enjoy the benefits and fulfil the duties of that office, to effectively participate in society,

[103] An exception is Alastair Richardson, 'Lateral Thinking: Justifying the Horizontal Application of Constitutional Rights' (2018) 21 Trinity College Law Review 159. See also Michael Forde, 'Who Can Remedy Human Rights Abuses? The "State Action" Question' in KD Ewing, CA Gearty and BA Hepple (eds), *Human Rights and Labour Law* (Mansell 1994) ch 9.

[104] Whether the theory espoused herein also helps to explain horizontal effect in other relationships, like landlord and tenant or seller and consumer, is not relevant and nor is it considered here. For a broader discussion of horizontality in 'private authority relationships' that 'bear public significance', see Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 5, 20, 26-27, 37, 68. 111-13, 134, 165-67, 175.

[105] There is a seam in private law literature, quite parallel to what we have sketched above, that talks about private law rights (particularly in respect of property) in terms of 'offices'. For example, John Gardner, *Torts and Other Wrongs* (Oxford University Press 2019) ch 3 suggests that all litigants, by virtue of their use of the court system to enforce the law of the land, assume an office of the state. Larissa Katz, 'Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power' (2012) 160 University of Pennsylvania Law Review 2029 argues that by instituting and enforcing a system of private property, states involve private individuals in government. Elsewhere, she says that 'popularised decentralised offices' are the 'building blocks of a… constitutional order': see Larissa Katz, 'Ownership and Offices: The Building Blocks of the Legal Order' (2020) 70 University of Toronto Law Journal 267, 273. Although Katz focuses on land, this insight seems particularly apposite in respect of employment too. As we have seen in the previous and this chapter, employment is a relationship of governance; to the extent that the state runs its economy by leaving the organisation of production up to private market actors, it clearly grants what Katz calls 'agenda-setting' power to employers. Understanding this 'governing' role that employment plays in the constitutional order, we can see that what Katz says of owners of private property is also true of employers: 'as office-holders [they] are liable to be conscripted as foot soldiers in the army of the good' (279). For a robustly contrary view, see Christopher Essert, 'The Office of Ownership' (2013) 63 University of Toronto Law Journal 418, and 'The Office of Ownership Revisited' (2020) 70 University of Toronto Law Journal 287.

individuals need protection from domination by other individuals. They need institutional means of neutralising threats to their independence of, in particular, political judgment and activity. A citizen who does not participate in political or civic-social life, or worse still a citizen who acts not on the basis of his own independent judgment, is a corruption of that office. One of the most important roles of a constitution is precisely to prevent this sort of corruption in offices and institutions of the state.

As such, protecting the privileges of one institution from encroachment by another is a well-established constitutional endeavour. Doctrines like the separation of powers, federalism, judicial review, non-delegation of legislative power, parliamentary accountability, *etc* all work to prevent the domination of one institution of government by another. These are frequently 'horizontal' in the sense that they govern the relationships between institutions that are co-equal in their place within the state. Barber refers to constitutional devices and doctrines that protect institutions from one another as 'self-defence mechanisms'.[106] These constitutional devices exist to keep the state what it is – for example, to prevent a democracy degenerating into tyranny.

Barber explains how self-defence mechanisms can be either negative or positive.[107] In the employment context, we could understand that distinction as follows. A negative defence mechanism would invalidate some contractual term: so, for example, if an employer tried to dismiss a worker for breaching a company prohibition on religious dress, that term could be exorcised from the contract and thus the dismissal would be unfair or wrongful. A positive defence mechanism would be a distinct cause of action for a worker to take against an employer for interfering with his right to privacy, *etc*.[108] As Gardner reminded us, the contract of employment is by no means necessarily the totality of the labour relationship.[109]

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[106] NW Barber, 'Self-Defence for Institutions' (2013) 72 Cambridge Law Journal 558 and *The Principles of Constitutionalism* (Oxford University Press 2018) ch 3.
[107] NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 79.
[108] This could be a standalone 'constitutional tort' (as in *Meskell v Córas Iompair Éireann* [1973] IR 121), or a rights-friendly interpretation of a legislative or common law cause of action.
[109] John Gardner, 'The Contractualisation of Labour Law' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 2. At 35, Gardner exhorted us to resist the 'social process' of reducing rights and duties in the labour relationship to contractual obligations. Rather, argues that the categories of employer and employee (and more broadly of worker) are ontological social phenomena that can be shaped by contracts but not reduced to them (or at least *were*: at 47, he seemed to argue it is now too late to reclaim these social categories from the 'all-consuming tyranny' of the contract of employment).

It can therefore be seen that the 'direct versus indirect effect' debate referred to in Chapter 2 matters less than it first appears for the purposes of this thesis. What matters for a theory of constitutional labour law is that the office of citizen should enjoy the sort of self-defence mechanisms that other institutions of the state have against each other. In designing or interpreting a constitutional framework, including the interpretation of both legislation and private contracts within that framework, we should have regard to the institutional prerogatives of the citizen, and offset threats to these that we know exist in the labour relationship, in the same way as we would have regard to the separation of powers in defending a legislature or federalism in defending a territorial sub-unit.

Constitutional labour law should be thought of in these terms, as a set of self-defence mechanisms to protect the institution of the citizen in its 'horizontal' relationship with other citizens. Its purpose is to protect the worker *qua* citizen from encroachment by other actors (generally employers, who may also be citizens, or corporations made up of individual citizens) that would undermine his political independence and compromise his ability to form judgments and take action in the political or civic-social realms (*ie* to act as a citizen). Such mechanisms are part of the well-functioning constitutional order: they are necessary to prevent a constitutional democracy from degenerating into plutocracy, with workers either excluded from the political realm altogether or corralled into retinues for the wealthy and powerful. Just as the dominated citizen is a corruption of that office (if not an oxymoron), a state whose citizens are open to such domination is a corruption of the state. By taking this view of horizontality as institutional self-defence, this theory can avert much of the scepticism about horizontal effect of rights (at least in the context of the labour relationship) that was canvassed in Chapter 2. Recall that we focused on two sets of complaints, that horizontality poses a threat (i) to private autonomy and equality (in ways that are undemocratic); and (ii) to the content of rights themselves.

First let us examine the 'democracy' critique. This lies in a concern that horizontal application of rights undermines democracy, by according power to the judiciary at the expense of the legislature. Really, this is a complaint about constitutionalisation *per se*, rather than constitutional *labour law* in particular. But the earlier section of this chapter has explained how the horizontal protection of rights through constitutional labour law is actually a democratic imperative, as these rights are supposed to facilitate and support political participation by workers. The entire purpose of constitutional labour law,

according to this theory, is to enhance workers' ability to function as citizens in a democracy, and thereby enhance democracy itself.[110]

Next, the 'autonomy' critique held: 'it is wrong to try evaluate the contract of employment by reference to the values developed in the context of political theory and theories of constitutional government'[111] and that constitutional labour law involves 'the imposition of unwelcome (illiberal) values by forcing individuals to comply with public standards of political correctness'.[112] First off, the theory of citizenship and its relationship to the state developed through Chapter 4 and this chapter ought to minimise our suspicion of any evaluation of private relationships by reference to 'theories of constitutional government' and 'public standards of political correctness'. By now it has been demonstrated that one's relationship with the state (*ie* one's ability to function as a citizen within the state) cannot but depend on one's relationship with others in the community. Citizenship has a horizontal dimension, in that private actors can and do compromise each other's political independence and activity – and so in defining the relationship between citizen and state, the constitution needs to condition the relationships between citizens and each other.[113]

Ultimately, as was shown in Chapter 2, the 'autonomy' critique boils down to a concern about balancing. We have primarily spoken about the rights of workers *qua* citizens, but we cannot forget that employers (or at least individual managers within corporate employers) are citizens too. As, indeed, are other workers within the same business, and customers or suppliers. So in granting workers self-defence mechanisms, we need to be careful not to undermine the ability of other citizens to participate in society too. Some of these concerns will come to the fore in Chapters 9 and 10 in particular,

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[110] For more, see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing 2009).
[111] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 63.
[112] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 27.
[113] Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (Oxford University Press 2019) 26: 'Applying a fundamental right horizontally indicates that an important tenet of common life… will suffer or break down if it is not protected against some or all private parties, as well as against the state. To apply fundamental rights to a private dispute is to imbue that dispute with a political character.' At 165-67, she says that right should apply horizontally 'in instances of private power *qua* ability to prejudice the equal enjoyment of fundamental rights within private forms of public participation', particularly where private actors control an important forum of socialisation (see also 11), or have the capacity to restrict citizens' access to public institutions.[113] Again, we do not need to concern ourselves with the full scope of horizontality in terms of potential duty-bearers – merely its place within constitutional *labour* law.

Admittedly, this may be an uncomfortable vista for labour lawyers. As Kumar put it, 'critically, if human rights conflict, we do not know if their resolution will be made in favour of workers in principle, consonant with the purpose of international and national labour law regimes'.[114] This will, of course, depend on the context of the dispute. But there are very good reasons to think that a balancing exercise informed by the theory set out in this thesis will tend to favour workers in a situation where their rights conflict with an employer's. For all the care taken earlier to stress the contingency of inequality of bargaining power, it is obvious that more often than not, workers will face steeper barriers to participation in governance than employers. We can think about the self-defence mechanisms of horizontal rights as a kind of 'anti-power', as Pettit would say: they exist to counteract pre-existing domination, rather than add to it.[115] If the purpose of constitutional labour law is to protect the ability to function in a democratic society, then only where there is a clear danger to an *employer's* ability to function within a democratic society should the law be interpreted to his benefit.

However, that is not to say that there will not be some modification to the content of rights – that the sort of protection constitutional labour law provides to workers from employers may be different from the protection offered by other areas of constitutional and human rights law from the state. The questions of balancing rights and modifications to the content of rights are highly interrelated. Indeed, Chapter 2 offered modification and balancing as a solution to the concern about private autonomy. As Part III will show, this does happen in practice already, with little sign of philosophical angst among the judiciary. But we need to examine more carefully the question of how rights should be balanced and modified to accommodate employer interests.

3. Balancing, modification and selectivity

When rights fall to be balanced or modified in constitutional labour law, the key is to understand why rights are being applied at all: as self-defence mechanisms to protect political independence, participation, and citizenship. This includes, of course, the

[114] Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Peer Zumbansen and Ruth Buchanan, *Law in Transition* (Hart Publishing 2014) ch 7, 134.
[115] Philip Pettit, 'Freedom as Antipower' (1996) 106(3) Ethics 576.

'contestatory mindset'[116] necessary for participation to be fruitful – citizens (including workers) must be able to pass the 'eyeball test'.[117] We saw in the previous section that yes, horizontality works both ways. Where the balance will be struck is contextual, but the balancing exercise will be purposive.[118] Indeed, it is only by having in mind a theory of why we need constitutional labour law at all that we can do an exercise in balancing or modification in a reliable and principled way.

Later chapters will examine practical instantiations of such balancing and modification, in respect of a range of constitutional values that should apply in the labour relationship. For the moment, the following should be said. First, we saw in Chapter 2 that balancing of rights is more complicated than a vertical application of a right against the state (which generally has no rights itself). Often, courts resort in such cases to a 'double-proportionality test'.[119] Ultimately, some version of this approach remains necessary – with important qualifications. There can be no question of giving each side in the balancing exercise presumptive normative equivalence: as repeated throughout this chapter, our theory of *why* we are balancing rights at all tells us a huge amount about the priorities of concern within the exercise. We are trying to protect the parties' respective ability to function as citizens in a democratic polity. So, our balancing inquiry is *not* how to interfere the least with (say) freedom of association on one hand and property rights on the other, or freedom of expression and business reputation. Rather, it involves recognising which party is most under threat of being unable to participate freely in democratic society (which, in general, will be the worker) and how best to ameliorate that threat without causing equivalent damage to the citizenship of the other. In other words, we are focused not just on the rights involved, but the *reason* for the rights.[120]

Chapter 2 also raised the prospect of simply bypassing balancing by instituting asymmetric rights. Obviously, this is common in labour law already: workers can sue employers for

[116] On which see further Chapter 6.
[117] Philip Pettit, *On The People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012) 47, and *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 5.
[118] *Cf* Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press 2016).
[119] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) ch 2, 49ff; Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) ch 11, 221ff.
[120] *Cf* Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 45.

discrimination but not *vice-versa*. Chapter 2 left open the question of whether this thesis could justify entirely asymmetrical human rights duties – whether, for example, workers could enjoy privacy protections against their employer, but employers could not protect their privacy from workers. In light of the foregoing, this seems unlikely. There may be good practical reasons to continue to create asymmetrical labour legislation; empirically, it seems likely that workers will have more cause to need the sorts of protections constitutional labour law offers (and it is precisely that need for protection for one's citizenship, the reason for having constitutional labour law, that will guide its development and interpretation). But one way or another, there will be balancing and modification. As we have seen already and will continue to explore in Part III, worker-protective legislation will inevitably fall to be interpreted in line with constitutional and human rights norms. Indeed, our case studies in Part III will illustrate that it is often in this context that a worker-protective *theory* of the interaction between constitutions and labour law is of most value, to save this sort of legislation. We will need to understand the legitimacy of aim and appropriateness of means in respect of ordinary labour law through some *theory* that can tell us how the constitution interacts with the labour relationship. Our theory is not confined to offering a 'bill of rights for workers',[121] but rather a *philosophical approach* to thinking about the relevance of constitutional norms in the labour relationship, including interpreting and applying justiciable rights and other kinds of state interventions.

There remains the question of selectivity – if we are not looking to enforce 'human rights at work', but equally if we are not confined to saying 'labour rights are human rights', then which rights are we talking about? Our guiding light for deciding (a) which rights might be justiciable within the labour relationship; (b) how these are to be understood in the context of employment; (c) how they are to (potentially) be balanced with the rights of others, including employers; (d) what other interventions may need to be made; and (e) how a constitution should reconcile these with other constitutional values, is our theory of constitutional labour law. That is, that constitutional labour law exists to protect the ability of workers to function as citizens of a constitutional democracy. The fact that the state depends on its population being able to function as citizens to remain democratic is the

[121] *Cf* Philippa Collins, 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199.

justification for intervention, and therefore the source of the particular interventions that need to be made.

Only by appreciating this 'why' of constitutional labour law can we begin to look at the question of *how* constitutional courts should approach the labour relationship and constitutional labour law. How our theory goes about justifying constitutional labour law in principle tells us a lot about what kind of constitutional labour law it justifies. It allows us to sketch a programme for constitutional labour law, and suggests ways in which we can critique existing constitutional labour law doctrine.

We saw above that we need to protect participation and political independence. These themes will be used to structure Part III. For the moment, to answer the selectivity critique, we should specify what sorts of legal content the values of participation and political independence generate. If constitutional labour law is about protecting workers' ability to function as citizens, and to function as a citizen is to participate in political and civic-social life, on terms that respect one's democratic equality with other citizens and make participation worthwhile, under conditions of political independence and freedom from domination by others, we can see that constitutional labour law should address the following:

(a) A balancing of 'control rights' over production between labour and capital. Workers should have meaningful participation in decision-making at work, developing the 'habits of democracy' that will enable them to be active citizens outside the workplace too. **This suggests constitutional labour law should protect worker organisation, representation, participation and fair procedures in decision-making.**
(b) Workers should be to participate meaningfully in decisions about general economic and social affairs that most concern their working lives. Their representative organisations should be integrated within the decision-making apparatus of the state, in a way that promotes subsidiarity. **This suggests constitutional labour law should involve dedicated public labour-related decision-making institutions or processes.**
(c) Workers should be safe from interference or undue influence by employers when exercising their rights in the political realm. Employers should not impose their

moral and social judgments on their workers, but rather workers should be free to bring their own values and judgments to bear on social issues. Likewise, employers should not be able to disempower specific groups of workers, or exclude and marginalise these from the public realm. **This suggests constitutional labour law should protect civil liberties at work, and offer protection against discrimination.**

Conclusion

This chapter should be read as the thesis' answer to Chapter 2. There, we exposed the 'justificatory gap' in existing literature in this field by highlighting a number of aspects of constitutional labour law that existing theories cannot explain. Here, we filled the justificatory gap: first, by focusing on the threat posed to workers' citizenship by the labour relationship, then by extracting the key aspects of citizenship that must be protected, and finally by discussing how constitutional labour law should protect those aspects, and how doing so overcomes the concerns raised in Chapter 2.

The nature of the labour relationship is such that workers face inherent risks of domination and depoliticisation – whether or not these risks instantiate for any particular worker at any particular time varying only with economic fortunes. Domination and depoliticisation are inimical to a citizenship based on participation and political independence. This makes insuring citizens against these risks a matter of constitutional concern for any state that holds itself out as a democracy. Protecting citizenship is a matter of public interest, not paternalism – even if a particular worker is happy to sell his rights of citizenship to his employer, the rest of society loses out when employers corral workers into 'retinues' in this way. As such, we can properly rely on constitutional labour law to override waiver of rights within employment, and apply constitutional norms even to private employers. That does not mean holding employers to the same standard as the state: there will be balancing and adjustment of rights to reflect the employment context, so long as citizenship is preserved. The next Part will demonstrate how that can be done in practice, as well as elaborating on which rights are necessary to protect the values of participation and political independence that infuse our model of citizenship, and thus our theory of constitutional labour law.

PART

III

INTRODUCTION TO PART III

This is a brief introduction to explain the structure and purpose of Chapters 6 to 10. As became clear at the end of Chapter 5, the theory of constitutional labour law based on a normative account of citizenship developed in this thesis must encompass legal protection for the participation and political independence of workers. As set out in Chapter 5, that will manifest in: representative organisations, decision-making processes in the workplace that offer an opportunity for those representatives to participate and that follow procedures that are fair to individual workers, subsidiary regulatory institutions beyond the workplace, and the protection of civil liberties and equality rights at work. We must also build on the work done in Chapter 5 to answer the concerns raised in Chapter 2 about how constitutional labour law should handle the issues of horizontality, waiver and the adaptation of rights.

What follows in this Part cannot be an exhaustive explication of how participation and political independence should be guaranteed in the labour relationship. Chapter 6 will focus on the constitutional implications of workplace participation, the relationship between industrial and political democracy, and the special role of trade unions as worker representative organisations. The choice has been made in this thesis to draw on Irish constitutional doctrine to illustrate in practice how participation should (and should not) be treated in constitutional labour law. That is to say, Chapter 7 will explore Irish case law on collective labour rights, and fair procedures in disciplinary proceedings. Chapter 8 will examine Irish law on subsidiary regulatory institutions.

Chapter 9 will elaborate on the values underlying political independence that are necessary to inform case law in this area. Chapter 10 will then use European case law to explore political independence in practice – that is, issues of civil liberties and equality. The reason for this division of sources has been explained in Chapter 1 and will be revisited at the beginning of Chapter 10 itself.

CHAPTER 6:
PARTICIPATION IN CONSTITUTIONAL LABOUR LAW

Introduction[1]

It was recounted in the preceding chapters that there are 'older constitutional currents' underlying modern labour law,[2] according to which labour law should give workers a role in administering the productive process and the economy in a broad sense, rather than merely fixing particular standards for working conditions.[3] There is a long history in the labour movement of aspirations towards 'industrial democracy',[4] a notable example of which is the model of the 'labour constitution' first developed by Hugo Sinzheimer and recently revived by Ruth Dukes.[5] For scholars in this tradition, labour law should support participation by workers and their representatives in economic and productive decision-making for two reasons: first, as instrumental to securing better material protections for workers; and second, to recognise the agency of workers, an inherent benefit of participation.[6] It seeks to position the employment relationship within a 'democratized economy… governed by capital and labour acting together in furtherance of the public good.'[7] The democratic credentials of labour law and industrial relations come from the participation of workers, employers and their respective organisations in decision-making; this gives such decision-making machinery constitutional legitimacy within the state.[8] In this way, the 'labour constitution' complements the 'political constitution' that facilitates

[1] Parts of this chapter, and the next two, formed the basis for three articles, published as Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211, and 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029, along with 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming). The author is grateful to the reviewers and editors for their feedback on those articles.
[2] Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 16.
[3] Nicole Busby, 'Comment: Reconsidering Historical Perspectives Anew – Old Ideas Adapted to New Forms of Work' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 5, 73.
[4] For example, see Sidney Webb and Beatrice Webb, *Industrial Democracy* (2nd edn, Longmans, Green 1920); Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart Publishing 2015); Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) ch 8.
[5] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014).
[6] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 59-62.
[7] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 4.
[8] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 13ff.

participation by citizens and their representatives in political processes.[9] To return to the discussion of the citizen as an office of the state in Chapter 5: what Dukes calls the political constitution is concerned with defining the relationship between the citizen and state institutions like parliament or administrative agencies (as well as defining the relationships of those institutions *inter se*); the labour constitution (partly) defines the relationship between the citizen and fellow citizens, other economic actors, and subsidiary regulatory institutions. In this way they are complementary: our understanding of the position of the citizen withing the constitutional order of the state is incomplete without considering his role in economic decision-making.

The theme underlying this Part is that complementarity between industrial and political democracy, which manifests in this chapter as a theoretical examination of how participation in workplace governance both supports, and is mandated by, citizenship of a constitutional democracy. Citizenship is to be understood in the sense explained in Chapter 4: the citizen is an active participant in political and civic-social life, armed with rights that protect him against domination by other agents and institutions. The chapter begins by developing the claim in Chapters 4 and 5 that their mutual citizenship demands that employers treat workers with a certain special kind of respect for their agency. This requires, as we shall see, that workers have the opportunity to participate in workplace decision-making.[10] It does not go so far as to prescribe specific mechanisms for this participation, advocating instead a 'mixed constitution' that could entail consultation structures, collective bargaining by trade unions, works councils, worker representation on corporate boards, *etc*. That said, a later section will focus on trade unions as playing a particularly valuable role in protecting and promoting the citizenship of workers: first, by facilitating the sort of participation in workplace decision-making we have been discussing, and second through broader political activity. This means the state has good reasons to promote trade unionism and support unions, through constitutional labour law. How it should do so will be the subject of Chapters 7 and 8.

[9] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 18.

[10] 'Opportunity to participate' is used here because we can hardly 'force the worker to be free'. However, from the perspective of the worker, being a *good* citizen requires he take advantage of that opportunity, just as it requires him to take advantage of the opportunity to vote in elections and inform himself about public debate. As such, citizenship does demand actual participation – but that claim is not relevant to the discussion in this chapter.

Constitutional position of workplace democracy

This thesis is not arguing that an individual worker should be able to assert a constitutional right to the establishment of specific democratic structures within his workplace. Preceding chapters have been at pains to point out the limitations of thinking about constitutional issues, and constitutional labour law, exclusively in terms of justiciable rights. However, should the state *legislate* for expanded workplace democracy, employers might invoke constitutional and human rights claims of their own, such as property or freedom of contract. In such circumstances, courts will need to consider the appropriate scope of these rights, and the legitimacy of interferences with them. This chapter argues that the best approach to an overall constitutional assessment of workplace democracy is by reference to the state's compelling interest in protecting its own democratic nature and structure from the risks posed by an undemocratic economy, and the benefits for citizenship of worker representation.

In a liberal capitalist society, production is generally left up to 'the market'.[11] This places decisions about production in the hands of private individuals and corporations;[12] perhaps for good reasons, to allow individuals to make decisions about what preferences they would like to satisfy and values to live by.[13] Anderson has argued convincingly that work should be reconceived as a 'public thing' (*res publica*), and thus democratised.[14] Her argument is that so long as work requires authority, hierarchy and command, then managers (government) should be accountable to workers (the governed). Her argument is one that follows the traditional 'firm-state analogy' – that workplaces are enough like petty dictatorships that the expectations we have for state governments (democracy and human

[11] Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 650 calls this a 'delegation of sovereign power' through private property rights. See also Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 19.

[12] On important distinctions between the market, firms and corporations, see generally Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017).

[13] Hugh Collins, 'The Vanishing Freedom to Choose a Contractual Partner' (2013) Law and Contemporary Problems 71, 77-79; John Gardner, 'Private Activities and Personal Autonomy: At the Margins of Discrimination Law' in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: the Limits of the Law* (Mansell Publishing 1992) 154-55, and 'On the ground of her sex(uality)' (1998) 18(1) Oxford Journal of Legal Studies 167; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 100-05.

[14] Elizabeth Anderson, *Private Government* (Princeton University Press 2017).

rights) should apply (to some extent) to workplace governments.[15] There is, however, a closer connection that Anderson overlooks: the very fact that both workers and bosses are, outside of the workplace, citizens of the same constitutional democracy *requires* that they treat each other in certain ways. The workplace is only one forum in which workers and employers are expected to interact, and the relationship of worker to employer, manager or colleague is only one connection between those same people. The workplace is, as such, a 'nested community': in any social system, there are various levels at which members of the overall community interact with and are connected to one another, which may vary in their social salience according to levels of attachment those members feel, and the background social (and legal) norms.[16] For the purposes of constitutional labour law, and therefore for this thesis, the most important relationship between two individuals in society is that of *concitoyens*. That relationship, as we saw in Part II, has normative implications for how those people treat one another, which must carry over into other 'nested communities' in which they interact.[17] It requires the ability to look one's fellow citizens in the eye rather than 'cringing beneath the rich man's frown', the willingness to discuss political issues frankly and contest decisions, in conditions of social equality, and respecting fellow citizens as people with whom one can co-operate for a common social good. It requires that parties to the relationship offer 'interpersonal justification' for decisions that affect each other's lives in important ways. One of the most important ways in which citizens can find themselves in hierarchical relationships with each other, where one party has the power to make very significant decisions about the other, is the labour relationship. Therefore, respect for mutual citizenship requires employers to allow workers to participate in productive decision-making.

[15] See also Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3. Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 3 talks about the 'capitalism/democracy contradiction'.

[16] For more, see Jeffrey S Slovak, 'Attachments in the Nested Community' (1986) 21(4) Urban Affairs Review 575, 576 and sources cited therein.

[17] It is important to note that normative influences as between nested communities are often multi-directional – as such, the relationship of worker to employer is likely to have effects on how they interact elsewhere. That is precisely what animates this thesis: the need to condition the labour relationship such that those effects do not inhibit workers' citizenship.

Production and participation

This elaboration will be continued below. First, we should distinguish the model pursued in this thesis from two significant contemporary works in this field. Dukes has already been mentioned:[18] she has revived the 'labour constitution' (first developed by Sinzheimer) to distribute power and structure relations among labour and capital within the economy, as a complement to the 'political constitution' that governs how power is distributed among organs of state. Under Ferreras'[19] model of 'economic bicameralism', every corporation above a certain size would be restructured to make senior management democratically accountable to two 'chambers', one each elected by workers and shareholders.

The present work is simultaneously broader and narrower than these models. Dukes includes all laws that structure power in the workplace within the term 'labour constitution'.[20] This thesis is concerned specifically with constitutional norms, at most encompassing the interpretation of legislation and contracts in light of constitutional norms. She is not so concerned with the 'spillover' from labour relations to the political sphere,[21] and so does not examine in as much detail the need to protect workers' political independence from employer influence.[22] Nor does Ferreras, who advocates 'political rights in the firm' for workers, rather than broadening the scope (as this thesis does) to the relationship between work and citizens' political rights,[23] and how to protect the latter from the former. On the other hand, this thesis is less detailed and prescriptive in how to structure collective labour relations and workplace democracy – particularly than Ferreras. Both have useful insights for how constitutional labour law should handle issues of workplace governance. Our theory of citizenship explains how to integrate what Ferreras and Dukes have to say into a broader view of the individual citizen's place within a constitutional democracy, and how that is supported by constitutional labour law.

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[18] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014).
[19] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017).
[20] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 5.
[21] For her treatment of this issue, see Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 3-4, 8, 16ff, 92, 195.
[22] For glimpses, see Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 81-82, 110-11, 196-99.
[23] What she calls 'a shell of rights applied to a narrow portion of the human experience': see Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 37. She touches more on these issues at 19, 32, 46, 83-86, 91-92, 109ff, 154, 158.

With those clarifications in mind, we can elaborate on the relationship between production, participation and constitutionalism. As will be illustrated in the next chapter, liberal constitutionalism tends to conceive of issues around worker representation and participation through the lens of 'freedom of association'. As we saw in Chapter 3, by gathering into voluntary organisations (trade unions), workers can engage in 'collective bargaining' with employers about the terms of their employment.[24] But neither 'freedom of association' nor 'collective bargaining' adequately captures the principle of participation that is at stake in collective industrial relations. Look at these provisions from the constitutions of some European democracies:

> All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the workplace.[25]

> It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain… the effective participation of all workers in the political, economic and social organisation of the country.[26]

> Workers shall possess the right to form workers' committees to defend their interests and democratically intervene in company life.[27]

This is not to say that textual formulations are what matter in constitutionalism – at least, they matter a lot less in a theoretical project like the present thesis than perhaps in other contexts. The concerns that will be highlighted in the next chapter would not necessarily

[24] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 33-36.
[25] Preamble to the Constitution of the French Fourth Republic of 1946, § 8. Translation provided by the *Conseil constitutionnel*: <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst3.pdf> accessed 25 January 2021. The status of the 1946 preamble is reaffirmed by reference within the preamble to the Constitution of the French Fifth Republic of 1958.
[26] Constitution of the Italian Republic, Article 3. Translation provided by the Parliamentary Information, Archives and Publications Office of the *Senato della Repubblica*: <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 25 January 2021.
[27] Constitution of the Portuguese Republic (7th revision), Article 54. Translation provided by the *Assembleia da República*; <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> accessed 30 June 2022. There are expansive provisions dealing with workplace democracy and trade unions in Articles 54-57.

be resolved by the amendment of the text of the Irish Constitution and its replacement with the French, Italian or Portuguese formulations, if there is not the theoretical infrastructure behind it to comprehend the proper role of worker organisations. As has been said, this thesis is largely agnostic on whether the theory of collective labour law it develops is incorporated into a constitutional settlement by amendment or judicial interpretation. These examples are raised simply in order to give an idea of how the underlying principle this thesis advocates might be couched within a constitutional settlement.

As we have already said in previous chapters, the importance of participation in productive decision-making in a theory of constitutional labour law arises from the insight that the fact of mutual citizenship shared by an employer and a worker requires the former treat the latter in a certain way. The productive process must be treated as a co-operative endeavour between employer and worker(s) as *concitoyens*, not a set of rules imposed by master on servant. For his part, the worker is entitled to choose representatives through which to participate in decisions, particularly (as we will see) in the interests of making his participation more effective. The employer has obligations to recognise these representatives – not out of some 'association' between the employer and the representatives, but as an incidence of his obligations to the worker. The consequences of failing to do this will be to denude the worker's ability to function as a citizen outside the workplace, in the public square. This is what Ferreras calls the 'subversive power of the democratic intuition' that citizens of modern liberal states possess.[28]

Recall that the opposite to a citizen is a slave – so the more like a slave a worker is, the less like a citizen he can be. For our purposes,[29] the key insight is that slavery necessarily implies involvement in production, but without any scope for participation in productive decision-making. Slaves were not kept as *pets*, but as beasts of burden. A slave is

[28] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 60. Fotis Vergis, 'Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 6, 94 charaterises this as 'a gut feeling that such a demand [for a democratised workplace] was not only natural, but indeed patriotic, the logical extension of their civic duties and entitlements and the normal corollary of a democratic polity.'

[29] It goes without saying that slavery is abhorrent for any number of reasons, particularly in its racialised form in the early modern period. But Chapters 4 and 5 have already led us to the examination of this particular aspect of the slave / citizen dichotomy.

'employed' (as a tool is)[30] in production – and like a tool, he has no agency or autonomy. Not only is the slave not entitled to the fruits of his labour, but he is denied any opportunity to direct his labour. 'Ownership', in the context of slavery, means the ability to unilaterally direct the productive efforts of human beings. 'Free' workers typically have little more scope to participate in decisions about production, while retaining a 'veto' over directions by quitting their job – but only at a potentially disproportionate cost to both their well-being.[31] That generates a strong incentive to 'trade off' rights of citizenship. If citizenship is to be the opposite of slavery, any productive process in which citizens are engaged cannot be unilaterally directed. To paraphrase Larkin, the employers have no right to carry on industry without the participation of workers in productive decisions.[32] Ownership of the means of production indeed gives employers proprietary control rights over production;[33] but workers are entitled to what we might call 'participatory control rights' by virtue of their status as citizens which they share with employers.[34]

Ferreras has painstakingly disentangled proprietary rights of 'capital investors' and managerial control within a firm.[35] The detail in Ferreras' model is unnecessary here:[36] suffice to say that a theory of constitutional labour law based on citizenship would agree that proprietary rights of control are not all that matters for legitimate decision-making in the workplace. This does not mean socialising property ownership itself: rather, the goal is 'social accountability' of decisions as to how property is used,[37] insofar as it is being put to productive use that requires the labour of workers (whom Ferreras calls 'labour

[30] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3, 53ff.
[31] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 41 recognises the problem as follows: 'Labour require[s] far more care than a machine or a closet full of office supplies, but ha[s] no more claim to govern the firm than either of the latter'.
[32] The original quote in *The Irish Worker* (26 April 1913) was: 'The employers cannot carry on industry nor accumulate profits if they have not got the good will of the workers or their acquiescence in carrying on such industry.'
[33] Alex Gourevitch, 'Quitting Work but Not the Job: Liberty and the Right to Strike' (2016) 14(2) Perspectives on Politics 307, 315.
[34] *Cf* Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) who reaches the same conclusion by considering workers to be 'labour investors'.
[35] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017).
[36] As said above, Ferreras' theory of 'economic bicameralism' is rich in useful insights, but far more detailed in its prescription of corporate governance forms that incorporate worker participation than is necessary for this thesis.
[37] Keith Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103.

investors').[38] Private property cannot be left as 'reason unto itself' in the making of decisions about how that property is used for production, when the productive process involves the participation of people other than the property owner.[39] Singer points out that (a) it is good for society that citizens invest reliance in economic relationships like employment,[40] and (b) the state (that is, the body of citizens) inevitably ends up subsidising the costs imposed by managerial decisions on workers and third parties;[41] so therefore the state has an interest in 'distributing' rights of control over how that relationship develops between the parties (and other relevant stakeholders) through a system of 'industrial relations'.[42]

This gives citizen-workers, through their representative organisations, a legitimate claim to participation in productive decision-making alongside employers.[43] At their heart, trade unions, collective bargaining and industrial action challenge the 'assumption' that the property rights of employers necessarily reserve to them all managerial authority over the productive process.[44] Remember, of course, that there exists a *spectrum* between citizen and slave; thus, the greater participation there is, the more like a citizen the worker is (or, to put it another way, the more like a relationship between citizens the employment relationship is). A worker cannot alienate the authority to make decisions about production (as is the case with every contract of employment) without losing some of that sense of citizenship. Arnstein posits a 'ladder of participation' consisting of eight levels: manipulation, therapy, informing, consultation, placation, partnership, delegated power,

[38] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 2, 15.
[39] Patrick Macklem, 'Property, Status, and Workplace Organizing' (1990) 40 University of Toronto Law Journal 74, 96ff. See also Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 15, 80.
[40] Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 622.
[41] Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 714-15, and 'The Reliance Interest in Property Revisited' (2011) 79(7) Harvard Unbound 80.
[42] Joseph William Singer, 'The Reliance Interest in Property' (1988) 40 Stanford Law Review 611, 637-640.
[43] And therefore, in the context of industrial action, to disrupt that production if their participation rights are not being respected.
[44] Alex Gourevitch, 'Quitting Work but Not the Job: Liberty and the Right to Strike' (2016) 14(2) Perspectives on Politics 307. As Hélène Landemore and Isabelle Ferreras, 'In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy' (2016) 44(1) Political Theory 53, 63 put it, the 'bundle of rights' that make up ownership over the means of production can and should be 'unbundled'.[44] See also Patrick Macklem, 'Property, Status, and Workplace Organizing' (1990) 40 University of Toronto Law Journal 74, 96ff.

citizen control.[45] Although again not prescriptive as to institutional form, the theory developed in this thesis demands forms of participation from 'partnership'[46] upwards.[47]

So far we have looked at the way in which participation in productive decision-making *protects* citizenship – in the 'negative' sense that submission to autocratic managerial decision-making poses a threat to citizenship, that participation and accountability can offset. However, we should also focus on the ways in which worker representation *promotes* citizenship, in a 'positive' sense. This is through building political consciousness and training citizenship skills.

Producing citizens

Chapter 5 explained how subjection to autocratic decision-making in the workplace may rob the worker of his sense of citizenship, and his political skills. It is hard for a person who spends most of his waking hours cringing beneath the rich man's frown to then stand tall in the public square and engage freely in political debate; to take on the responsibilities of an active role in community life with neither fear nor favour. Conversely, taking on such responsibilities at work and gaining experience in negotiation, deliberation and decision-making processes (including elections of representatives and ballots on collective agreements) has spillover effects into the political realm because it builds what O'Neill and White call 'democratic character'.[48]

[45] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Institute of Planners 216.
[46] In which 'power is in fact redistributed through negotiation between citizens and powerholders [who] agree to share planning and decision-making responsibilities through such structures as joint policy boards, planning committees and mechanisms for resolving impasses': see Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) Journal of the American Institute of Planners 216, 221.
[47] This 'rung' obviously includes collective bargaining through trade unions, but could stretch to forms of co-determination. Higher levels would encompass the sort of 'economic bicameralism' Ferreras argues is necessary for a transition to more democratic workplaces: managers wholly accountable for strategic decisions to representatives of workers as well as to shareholders. The aim here is not to be prescriptive about forms of worker representation and participation, but to offer normative standards by which to judge those forms as they are implemented in practice.
[48] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 258-59.

Bogg and Estlund have written about the role of trade unions, and strikes in particular, as part of 'the contestatory dimension of civil society'.[49] There are two elements to this. First, they argue that 'self-organisation of the marginalised and disempowered render their voices more audible to the powerful', not only their own employers but the powerful throughout society.[50] By their involvement in labour activism, workers become a socially-salient group, whose interests must be considered by decision-makers in both industry itself and the political system. Only then does the working class have a 'legitimate political existence'.[51]

Second, if 'vigilance [is] the price of liberty',[52] as republicans have always held, then citizens need constant training in the contestatory mindset necessary to function as a citizen. The habits of democracy must be practised, or they will atrophy.[53] Casting a vote at five-year intervals is insufficient to keep individuals in these habits, and citizens cannot just switch on the associated contestatory mindset at election time. As Bernard puts it:

> Citizens cannot spend eight or more hours a day obeying orders and accepting that they have no rights, legal or otherwise to participate in important decisions that affect them, and then be expected to engage in robust, critical dialogue about the structure of our society. Eventually the strain of being deferential servants from nine-to-five diminishes our after-hours liberty and sense of civic entitlement and responsibility.[54]

[49] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 237.
[50] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 237.
[51] Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 276.
[52] Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 13, 237.
[53] Perry Anderson, 'The Limits and Possibilities of Trade Union Action' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 267; Tony Lane, *The Union Makes Us Strong* (Arrow Books 1974) 114-15; Richard Dagger, 'Neo-republicanism and the Civic Economy' (2006) 5(2) Politics, Philosophy and Economics 151, 161-62.
[54] Cited in Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 154.

This poses great dangers for a democratic state. The fear is that employers will expand 'factory discipline' into all areas of life – most pertinently, the political sphere.[55] Citizens' ability to function properly in the intermittent political process is limited by the fact that their political skills are, by and large, *suppressed* at work,[56] which generally makes up the bulk of their waking hours. But the situation is worse than that: not only are workers depoliticised when they have no participatory role in workplace decision-making, but they are actively trained to defer to orders from superiors. In fact, this is one of the very reasons early political theorists were anxious to exclude the working class from citizenship: a worker has no time to develop political opinions, and such opinions as he does have 'are not his own but belong to his master'.[57] A constitutional democracy cannot persist long as such if it rests on the actions and beliefs of a population trained to act like subjects, not citizens. It is easy to see how such a state could degenerate towards plutocracy, captured by economic elites towards whom workers instinctively defer, acting as a mere 'retinue'.[58]

The maintenance of social institutions for the 'training' of citizens is not all that unusual, and many of these are supported by state intervention. Few are the schools and universities that do not include among their goals the development of citizenship.[59] It is not at all

[55] Vincenzo Pietrogiovanni, 'Refining the Boundaries of Labour Law: Is "Double-Alienness" a Useful Concept for Classifying Employees in Times of Fractal Work?' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 4.

[56] There are categories of workers for whom this is less likely to be true. Most obviously, people employed by political organisations, but also people whose work is closely related to, or used as a basis for, political decision-making, like journalists, economists and academics. Of course, sometimes these workers will, as a matter of professional obligation, try to appear 'apolitical' (and thus, it is supposed, more objective) so they will be taken seriously by a range of political actors. The implications of these special cases are not considered here – suffice to say that even if political engagement is part of one's job, one might still be 'depoliticised' in other ways, by a dominating structure of the workplace. (One recent high-profile example is the controversy over unionisation at leading media publications in the USA: see, for example, Michael Sainato, 'Leaked messages reveal New York Times' aggressive anti-union strategy' *The Guardian* (London, 1 February 2022); Hamilton Nolan, 'The New York Times is a reminder: good liberals often oppose unions' *The Guardian* (London, 9 January 2022).) There may thus still be benefits for citizenship arising from more participatory workplaces in industries that are 'politics-adjacent'.

[57] Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 115. See also *Philip Pettit, Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999) 158ff; Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.

[58] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427.

[59] Trinity College Dublin, for example, 'challenge[s] students to think independently, communicate effectively, act responsibly, and develop continuously, equipping them for lives of active citizenship': Trinity College Dublin 2020-2025 Strategic Plan, 8. Indeed, in this context, the development of students as citizens is mandated by the state – for example, in the Higher Education Authority 2018-2022 Strategic Plan, 2, 8.

implausible that workplaces can perform a similar 'preparatory political role',[60] with appropriate involvement from trade unions and the support of the state. Indeed, Ewing argues that the state has a *duty* to ensure that employment conditions are such that allow 'people [to] participate in political decisions as full and equal citizens'.[61]The state's compelling interest in protecting its own democratic nature and structure from the risks posed by an undemocratic economy justifies an approach to constitutional labour law that facilitates workplace democracy. The atrophy of citizens' participatory and deliberative skills because of non-participatory workplace governance,[62] and the erosion of their 'contestatory mindset' – the vigilance on which the republicans remind us liberty depends – is a serious risk to the democracy protected by state constitutions. Constitutions should be designed and interpreted with this in mind.

Trade unions in particular lend this 'psychological support'[63] for citizenship in two ways: awakening workers to political engagement and instilling values; and opportunity to practice deliberative democratic skills.

[60] To borrow a phrase from Perry Anderson, 'The Limits and Possibilities of Trade Union Action' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967) 247.

[61] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103, 111, 114 channels Laski's claim that 'the first function of labour law is to help provide the basic conditions necessary for effective political citizenship'. Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 46 similarly invokes Auroux's *dictum*: 'They are citizens in the *polis*; workers must be citizens in their firms as well.'

[62] Of course, political skills can be developed outside of work, but three points should be made in response: (a) the typical worker spends so much time (and energy) at work that there is not much left over for civic development; (b) the time spent at work (in a non-participatory, dominating environment) undermines the efforts made outside work to develop citizenship skills and attitudes; and (c) employers sometimes seek to extend their control over political, social and moral activities and development into a worker's 'private life' – as Chapters 9 and 10 will examine in detail. So constitutional labour law remains necessary to protect the citizenship of workers. As for those who do not work: obviously, they will not be able to rely on the participatory governance mechanisms and representative organisations supported by the model of constitutional labour law advocated in this chapter to develop their civic skills. Ensuring that those who do not work, for whatever reason, can also develop as citizens is just as crucial a concern for the state; but since this will inevitably be by means other than constitutional *labour* law, it is beyond the scope of this thesis. As set out above, the labour relationship generates *specific* threats that need to be countered, above and beyond the general concern with developing citizens outside the labour force. Not being exposed to these threats mean that non-working citizens may be better placed in some circumstances to develop their citizenship – through participation in voluntary organisations like neighbourhood councils or parents' organisations in schools, for example. Such civil society organisations are vital to democracy, but beyond the reach of constitutional labour law. The importance of these other opportunities for public participation does not detract from that of the workplace, and of constitutional labour law.

[63] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 259.

(a) Political awakening and values

First, the labour movement inculcates a sense of class consciousness and solidarity among its membership. At first glance, this might seem antithetical to democratic citizenship, echoing Madison's fear of society devolving into 'factions'.[64] Indeed, Chapter 5 explained how a class-based society is inimical to citizenship: the phrase 'second-class citizen' is always invoked as a criticism of the constitutional order.[65] However, this overlooks three important points about the way class consciousness manifests in labour activism. Although it relies on working-class solidarity to accomplish its goals, the labour movement ultimately aims towards the *elimination* of class as a socially-salient characteristic. Furthermore, trade unions engage in 'political education', awakening workers to the importance of political activity and the impact political decisions have on their everyday lives, and offering a framework through which to understand politics. This will be returned to below. The key is class *consciousness*: to be aware of and understand the causes of one's material conditions, the potential for change, and the policies that may be enacted to bring about improvements.[66]

Moreover, the guiding principle of trade unions is 'solidarity'. Durkheim explains this as the individual making personal sacrifices for the good of the community,[67] an attitude which requires a certain level of self-identification with the community: 'The self and its identifications have expanded significantly'.[68] This is not the same as altruism or charity – solidarity sees other members of the community as equals whereas charity implies hierarchy; and solidarity allows the individual to share a common interest with others, whereas charity is about addressing the personal interests of others. Each individual feels responsible for the well-being of others, and the collective well-being of the community. 'Solidarity' also invokes the idea of a group presenting a 'united front' in the face of

[64] James Madison, *The Federalist no 10* (1787) <https://founders.archives.gov/documents/Madison/01-10-02-0178> accessed 16 February 2021. See also Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 263.
[65] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415.
[66] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 260.
[67] Summarised in Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 34-35.
[68] Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 2.

antagonism to an individual member of the group.[69] This requires members of a group to consider the interests of other members in the course of the group's internal decisional processes, and then stand by a collective position or 'back up' the position of an individual member in interactions with those outside the group. It thus considers that 'an injury to one is an injury to all'. Both dimensions of solidarity are necessary among citizens, particularly for the functioning of a welfare state. Stjerno argues that 'solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state',[70] which clearly invokes the first dimension of solidarity mentioned above. However, others argue that political rights, labour protections, welfare provision, *etc*, were won by means of bitter strikes and protests, and maintained only by the background threat of recourse to the same by the working class.[71] Therefore, by inculcating solidarity among workers, trade unions contribute to the maintenance of these rights and systems within the state. These values are ingrained into trade unionists by virtue of how they are put into practice within the union itself.

(b) Democratic skills

The second contribution is that unions are themselves democratic organisations: they have constitutions and standing orders that are agreed by the members, senior officers are elected by the membership, there are frequent meetings where members can air their views, ballots are held for major decisions like industrial action and acceptance of collective agreements, *etc*. Indeed, many of these democratic characteristics are mandated by law in some jurisdictions.[72] Although the requirement that unions be democratic in this way is

[69] Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 43ff.
[70] Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press 2005) 2.
[71] Laurence Wilde, *Global Solidarity* (Edinburgh University Press 2013).
[72] In Ireland, for example, the Industrial Relations Act 1990 requires that ballots be held for industrial action in accordance with the provisions of section 14, including that ballots be secret and that all members effected by the proposed industrial action have a fair opportunity to participate. In *Rogers v the Irish Transport and General Workers Union* [1978] ILRM 51, Finlay P held at 57-58: 'It is… a necessary corollary of the right to join and become a member of a trade union that the right must extend to taking part in the democratic processes provided by it and in particular to taking part in the decision-making processes within the rules of the trade union.' Finlay P conceded at 58 that the precise extent to which the decision-making procedures involve participation by members is subject to the union's internal rules, but that the constitutional guarantee of fair procedures still applies to require some minimum level of meaningful participation (see 58-59). For discussion, see Michael Forde, *Industrial Relations Law* (Round Hall 1991), 243-44.

sometimes criticised as state interference with their autonomy,[73] we can also see how this ensures that unions serve the purpose of giving workers first-hand experience of democratic participation. This makes workers more effective citizens, as they have practice in the 'habits of democracy' de Tocqueville considered essential for *state* democracy to thrive.[74] Unions thus 'act as hubs of socialisation and democratisation within a market structure', 'a concrete manifestation of democracy and the political method it entails', 'a Petri dish of micro-democracy' and 'incubators of civic virtues'.[75]

What is true for the internal affairs of trade unions is all the more so for the workplace itself. Of course, internal union affairs offer some opportunity to practise the habits of democracy, and there is some appeal in the ability to elect officers, address public meetings, *etc* – but the same can be found in all kinds of voluntary clubs and associations. The special role played by trade unions is the opportunity to be involved in decisions with *real material impact* on the working and living conditions of oneself and one's colleagues.[76] Raising the stakes incentivises participation and encourages responsibility, turning the workplace itself into a 'production line' for citizens.[77]

We have referred above, and in earlier chapters, to models of workplace democracy; there is no need to repeat these here.[78] These mechanisms are best understood as a spectrum,

[73] See, for example, Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45(3) Industrial Law Journal 299. See also Brian Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28(2) Industrial Law Journal 153.
[74] See Dana Villa, *Public Freedom* (Princeton University Press 2008), ch 2.
[75] Fotis Vergis, 'Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 6, 87, 97-101.
[76] Fotis Vergis, 'Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 6, 97. Without these material consequences for decision-making, the trappings of internal union democracy cannot help but invoke the climactic meeting of the People's Front of Judea in Monty Python's *Life of Brian* (HandMade Films 1979). For the particular scene in question, see <https://www.youtube.com/watch?v=YawagQ6lLrA> accessed 12 February 2021.
[77] Fotis Vergis, 'Back to the Future: Rediscovering the Non-Economic Role, Value and Scope of Labour Law and Collective Labour Institutions in a Changing World' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 6, 99: 'A worker given the chance to participate in the regulation and organisation of her own working conditions and the provision of her labour, and thus to have her own economic freedom fully respected, develops into a citizen that demands and enjoys greater freedom form coercion.'
[78] Recall that the 'syndicalist' approach to labour law mounts a challenge to capitalist modes of production that equate ownership of the means of production with exclusive managerial control over the productive process and other associated decision-making. Syndicalists argue that workers have some claim to rights of participation and influence in decisions made that affect their working lives and conditions.

offering workers varying degrees of voice, influence and control over productive decisions. Working itself becomes a means of participating in public life and a site of 'civic interaction'[79] when the worker is empowered to shape the conditions under which this takes place,[80] and can evaluate those conditions by reference to his own sense of 'democratic justice'.[81]

Trade unions operate within this broader context of workplace democracy mechanisms. They are one means of facilitating this kind of participation in productive decision-making. The best approach is probably a 'mixed constitution'[82] of trade unions, works councils, individual employers and employers' representatives.[83] The next section will explain why the thesis has chosen to focus on trade unions in particular, but it should be borne in mind that the underlying principles apply to other mechanisms as well. The point is that whatever method is chosen, participation in productive decisions help prepare workers to function as citizens in the political system and society more broadly, and constitutional labour law should be interpreted and applied from that perspective. This benefit to the state itself should be recognised in assessing the constitutionality of workplace democracy mechanisms, including any interference with property rights.

Trade unions are probably the most well-established and significant means of participation in most industrialised democracies. But neither the pedigree nor ubiquity of trade unionism alone justifies its special role within constitutional labour law. For that, we must examine the advantages of trade unions for the citizenship of workers, and the role they play in a democracy.

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[79] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 86.
[80] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 32.
[81] Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda Richmond Mouillot tr, Cambridge University Press 2017) 89-92. Contrast this with the 'devaluing' of citizenship by the 'neoliberal turn' towards the 'entrepreneurial' spirit over 'civic motivation': see Robert Knegt, 'Recovering the Impact of Normative Regimes on Labour Relations Practices: A Socio-Historical View of Institutional Requirements' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 2.
[82] Elizabeth Anderson, *Private Government* (Princeton University Press 2017) 68.
[83] Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) 4, 13, 20ff, 33-35, 125.

Advantages of trade unions

It should be stressed again that this thesis advocates worker participation is through a 'mixed constitution' of unions, works councils, consultative committees, board representatives, *etc*. At one level, the co-existence of these measures throughout Europe reflects both national economic diversity (indeed, even within national economies, some sectors and businesses might lend themselves better to one form of representation over others) and the historical evolution of industrial relations. Here is not the place to conduct either a historical or a comparative survey of these diverse industrial relations structures.[84] All that needs to be done is to show the unique role that trade unions would play in an industrial relations system inspired by the values of citizenship explored in Chapter 4.

Blackham *et al* argue that trade unions are the key to 'market democratisation [which is] a prerequisite for a functional liberal democracy.'[85] There are five reasons to prefer trade unionism as a means of worker participation over, though not to the exclusion of, other forms of participation.[86] These are: independence; expertise; resources; dedication and division of labour; and scope of activity. Each will be considered in turn.

As Ewing puts it, 'Effective participation can take place only if the vulnerability of the individual worker is reinforced by the security and strength of an autonomous organization independent of the employer.'[87] It is on this independence that 'the integrity and efficiency' of other forms of worker empowerment rest.[88] This independence is necessary to offset the employer's inherent advantage in union organising campaigns and collective bargaining

[84] For such an analysis, see Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021).
[85] Alysia Blackham, Miriam Kullmann and Ania Zbyszewska, 'Introduction' in Alysia Blackham, Miriam Kullmann and Ania Zbyszewska (eds), *Theorising Labour Law in a Changing World* (Hart Publishing 2019) ch 1.
[86] This thesis will not consider the relationship between trade unions and these other forms of participation. It should be noted that this varies by jurisdiction – in some countries, unions are granted the exclusive right to nominate candidates for works councils *etc*: see Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021). For a broader discussion, see Marco Biagi and Michele Tiraboschi, 'Forms of Employee Representational Participation' in Roger Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (11th edn, Kluwer 2014) ch 19.
[87] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103, 119.
[88] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103, 118. Likewise, Alan Bogg, 'The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness' (2001) 64(6) Modern Law Review 875, 878 says: 'The voices of professional trade union organisers, economically independent of the employer, may well be imbued by candour and eloquence lacking from those whose livelihoods remain in the hands of the employer.'

rounds.[89] 'House' unions are anathema to 'contestatory citizenship' at work because the leadership of those unions cannot be trusted to put the interests of workers first.[90] Of course, workers' representatives at the enterprise level (*eg* shop stewards) should be employed at that enterprise. But that should not prevent other union officials having access to the enterprise and to workers who are actual or potential union members, nor does it diminish the fact that the independence of the shop steward is bolstered by the support of extra-enterprise union officials.

Expertise and resources can be taken together. The former assumes particular importance in circumstances where, as is the case in Ireland and most economies outside northern Europe, trade union density is currently very low. Given such a low base, it is unlikely that most workplaces will have anyone who is experienced in labour organising and industrial relations. Therefore, attempts to organise and negotiate in-house face an enormous uphill battle, and would benefit greatly from consultation with experienced trade union officials outside the enterprise.[91] Even once established, in-house representative organisations are unlikely to develop the necessary expertise in organising, negotiation, and other services trade unions offer (like representation at disciplinary proceedings, on which more in the next chapter) due to staff or membership turnover, and less opportunity to use those skills. The existence of unions that organise beyond individual enterprises allows for expertise and experience to be developed through greater usage, and to be pooled for the benefit of members at other enterprises, through the maintenance of full-time union officials at headquarters. The same can be said for resources like strike funds: again, it is unlikely workers at any individual enterprise will be able to build up the resources necessary to sustain collective bargaining processes and industrial action. In particular, a representative organisation cannot get off the ground in any given enterprise without someone doing the organising, and if the best person to do this is a full-time union official rather than workers volunteering in their spare time, that official will need to be paid by members of the union *outside* that workplace.

[89] Alan Bogg, 'The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness' (2001) 64(6) Modern Law Review 875, 880.
[90] Michael Doherty, 'Union sundown? The Future of Collective Representation Rights in Irish Law' (2007) 4 Irish Employment Law Journal 96.
[91] Alan Bogg, 'The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness' (2001) 64(6) Modern Law Review 875, 887.

The next advantage is related to the expertise point: that a union allows for the existence of dedicated officials to whom rank-and-file members can 'outsource' monitoring of working conditions and the conduct of negotiations with employers (whether in formal collective bargaining rounds or more quotidian interactions on issues of concern). If vigilance is the price of liberty, as the republicans tell us, then it makes sense to have a dedicated 'watchdog' in union headquarters rather than relying on workers taking on that monitoring function in addition to their ordinary workload. This enables a division of labour that makes worker participation, through representatives, more effective.

Finally, unions have a broader scope of activity than enterprise-based representative structures. Some of this is contingent: there is no reason why, for example, works councils cannot also be given access to resources for strike funds or welfare payments and pensions, but it does seem slightly incongruous with their close connection to the actual workplace. However, there remains two distinct inherent advantages to trade unions in this respect, from the perspective of citizenship. First, membership of an inter-enterprise union broadens workers' horizon of concern. It is not a great leap from the 'I'm alright, Jack' of the blackleg to the 'we're alright, Jack' that creeps into workplaces with good pay and conditions, perhaps as a result of effective (but narrow) representation. Unions encourage workers in one enterprise to be concerned about the conditions in other enterprises – either because of genuine solidarity, or the enlightened self-interest that appreciates how bad conditions in one enterprise will undercut businesses who treat workers better, starting a race to the bottom. 'An injury to one is an injury to all' can be viewed as either a normative claim (that even those unaffected by bad conditions in another workplace are concerned out of a sense of solidarity), or an empirical one (that allowing one worker to be treated badly will steadily undermine how other workers are treated).

The second way in which unions' broader scope of activity is an advantage over other forms of representation will be seen in the discussion in the next chapter of autonomous labour institutions, tripartism, sectoral bargaining, and extension of collective agreements. This is because unions are capable of participating in institutional structures that transcend the workplace in ways that works councils *etc* are not. This not only increases the effectiveness of worker participation in productive decision-making ('workplace democracy' *per se*), but crucially for the purposes of this thesis' commitment to citizenship of a constitutional democracy, gives workers a legitimate role to play in the administration of the economy

and society more broadly. Through unions' participation in sectoral and tripartite institutions, and through the state's support for the collective bargaining process and lending its public power to enforce bargains struck by unions, workers are recognised as stakeholders within the political and institutional structure of the state.

The final section of this chapter will focus on the logical endpoint of the 'democratic spillover' we have just seen: trade unions as a focal point or channel for 'conventional' political activity by workers. Again, unions are the best form of worker representation and participation to realise these benefits. As such, a theory of constitutional labour law that seeks to bridge the gap in labour law theory (as we saw in Chapters 2 and 3) between traditional collective labour rights and the broader political and civil liberties of workers should favour unions as a representative and participatory mechanism.

Trade unions as political actors

As mentioned in Chapter 3, trade unions are often political actors in a 'big P' sense – they are actively engaged in electoral activity or act as civil society campaigning organisations, like charities and other NGOs. O'Neill and White have identified a number of such contributions trade unions make to democratic politics.[92] As such, they allow their members, and workers more broadly, a means to participate as citizens in political life – in the same way many other organisations do. For present purposes, the most relevant contributions can be summarised as follows (in order of how closely related they are to trade unions' core function, representation of workers in collective bargaining with employers):

1. *Campaigning for state intervention in particular disputes*

Trade unions frequently call on the government to intervene in a specific industrial dispute (obviously, on the side of the workers involved). For example, at time of writing, a prominent campaign is being waged by Mandate and other trade unions in support of former employees of Debenhams department stores, demanding government intervention

[92] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14.

in the liquidation process. The pickets and press releases have contained statements like 'This is the government's fault. They let Debenhams do this to us, so they should fix it and make it right' and 'The Taoiseach has let us down badly'.[93]

2. *Lobbying for laws and policies*

This is probably the primary way in which trade unions engage in the political process.[94] Unions function as lobbying organisations, like any other NGO, to advocate for or against certain laws or other state policies.[95] O'Neill and White draw attention to the importance of such lobbying as a counterweight to the political influence of corporations.[96] It should be noted that although unions do tend to lobby more intensively on labour-related policies and laws, by no means are their political activities confined to specifically labour matters. Forde categorises these as 'trade' and 'ideological' political objectives.[97] To take SIPTU (Ireland's largest trade union) as an example: although one of their flagship campaigns at time of writing is to 'Make Sick Pay Mandatory'[98] (clearly a labour-related law), they have also been instrumental in the 'STOP67'[99] campaign to prevent the planned increase in the state pension age (which is probably still a labour issue, but less categorically so), support the 'Raise the Roof' campaign for a change in housing policy,[100] and express 'Solidarity with Cuba'[101] (both of which are only incidentally connected to the interests of workers *qua* workers).

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[93] See, for example: <https://mandate.ie/2021/02/ex-debenhams-workers-mark-300-days-on-strike-reiterate-call-on-taoiseach-to-make-funds-available-to-workers/> accessed 9 February 2021.
[94] Michael Forde, *Industrial Relations Law* (Round Hall 1991) 227.
[95] *Cf* Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2012) 32 Comparative Labor Law and Policy Journal 217.
[96] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 261.
[97] Michael Forde, *Industrial Relations Law* (Round Hall 1991) 228.
[98] <https://www.siptu.ie/campaigns/makesickpaymandatory/> accessed 9 February 2021.
[99] <https://www.siptu.ie/campaigns/stop67campaign/> accessed 9 February 2021.
[100] <https://www.siptu.ie/campaigns/siptusupportedcampaigns/raisetheroofcampaign/> accessed 9 February 2021.
[101] <https://www.siptu.ie/campaigns/siptusupportedcampaigns/internationalsolidarity/siptusolidaritywithcuba/> accessed 9 February 2021.

3. Political information and education

Relatedly, trade unions serve to bring to public attention issues which may otherwise have gone unnoticed, and develop and disseminate policy responses.[102] In this way, they can function like watchdogs or think tanks. Importantly, their informational function is exercised not only in respect of their membership (educating workers on political issues), but the wider public (bringing issues like working conditions to the attention of voters, who may adjust their political behaviour accordingly).

4. Electoral politics

In many jurisdictions, trade unions are actively involved in electoral politics. Sometimes this takes the form of endorsing certain political candidates on the basis of their policies – particularly in the USA, where unions will often endorse one candidate over others in party primaries, as well as one party's nominee over others in the general election.[103] This may entail making donations from union funds to political campaigns,[104] or union officials engaging in canvassing activities. The strongest manifestation of union involvement in electoral politics, of course, are the institutional links between social democratic political parties and trade unions common across Europe.[105] Delegates from affiliated trade unions are frequently given voting rights in party decision-making processes like leadership elections, or dedicated seats on party executive committees.

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[102] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 258.

[103] For discussion, see Marick F Masters and John Thomas Delaney, 'Union Political Activities: A Review of the Empirical Literature' (1987) 40(3) Industrial & Labor Relations Review 336; Larry Cohen, 'We Believe that We Can Win!' (2017) New Labor Forum 26(1) 11.

[104] The maintenance of 'political funds' by trade unions is generally regulated by law, such as the common requirements that political funds are kept separate from other union funds and that union members have the right to 'opt out' of contributing to political funds through their dues: see, for example, the Trade Union Act 1913, sections 3, 5 and 6. Confines of space preclude discussion in sufficient detail to resolve the question of whether such exemptions are necessary to preserve the political independence of workers (see Chapter 9) or if, on the other hand, this is adequately protected by a prohibition on closed shops (see Chapter 7). For present purposes, it suffices to note that political funds are standard practice for trade unions in many countries.

[105] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 260-61; Wolfgang Streeck and Anke Hassel, 'Trade Unions as Political Actors' in John T Addison and Claus Schnabel (eds), *International Handbook of Trade Unions* (Edward Elgar Publishing 2003) 345-47.

5. *Constitutional politics*

Particularly in historical context, trade unions and other labour organisations have often been involved in more 'foundational' political action. For examples, we could look to the participation of the Irish Citizen Army (the paramilitary wing of the Irish Transport and General Workers Union) in the Easter Rising, or the role played by *Solidarność* in the fall of Communism in Poland. More broadly, as explained in Chapter 3, trade unions have historically campaigned for the extension of the franchise to members of the working class. This sort of constitutional or 'meta-political' action is the least obviously connected to trade unions' role in representing workers in collective bargaining processes, but it is important to highlight in the context of constitutional labour law, because it points us towards the labour movement's role in reinforcing or strengthening democracy. Of course, supporting democracy in a general sense might well involve contesting *particular* governments or their policies (particularly for trade unions – as set out above, trade unions are likely to be campaigning for changes in legislation that regulates work). But as will be seen further in Chapter 9, contestation is itself an important aspect of democracy, rather than a challenge to it.

Although important means for workers to participate in the political process as citizens, the above activities of trade unions are not the focus of this chapter. Few dispute the rights of trade unions to engage in 'big-P' political activity in the same way as other NGOs, lobbying organisations, and political parties do, even if we generally do not think of such action as trade unions' 'core' function. Indeed, in *ASLEF v United Kingdom*,[106] the European Court of Human Rights upheld the rights of trade unions to limit their membership to those who shared a certain political viewpoint, declaring:

> Historically, trade unions in… Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the

[106] Application no 11002/05.

well-being of their members, but are often ideological, with strongly held views on social and political issues.[107]

Conclusion

This chapter sought to elaborate on the theme of participation within our theory of citizenship as the basis for constitutional labour law. It took a necessarily broad overview of the relationship between labour activism, workplace democracy, and citizenship, determining that the participation value of citizenship requires a 'mixed constitution' of industrial relations both inside and outside the enterprise. However, within this model, trade unions have a special role to play that reflects their particular advantages as mechanisms for participation. Thus our theory of constitutional labour law remains committed to the traditional goals of labour law.

It is also important to be aware that this chapter has contributed to the work of bridging the divide between 'traditional' concerns of labour law (collective action to overcome inequality of bargaining power) and the sorts of civil liberties that will be examined in Chapters 9 and 10. To borrow a phrase from Ewing, labour activism opens 'new frontiers… in the fertile landscape of citizenship'.[108] Trade unionism is part of a broader political project,[109] a necessary complement to those civil liberties in allowing workers to act as full citizens of a constitutional democracy. Unions contribute in many ways to the maintenance of democracy, chiefly by acting as a bulwark against plutocracy and by assisting in the formation of politically independent and engaged citizens. The state has an interest in promoting these functions of trade unionism, and therefore should adopt a 'promotive stance' towards union organising and collective bargaining.[110] Quite how this should be done is referred to in the latter part of the next chapter, and in Chapter 8.

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[107] Application no 11002/05, [50]. It is worth observing that in some jurisdictions, there are strong divisions between trade unions on, for example, a confessional basis. See further Michael Forde, 'Trade Union Pluralism and Labour Law in France' (1984) 33 The International and Comparative Law Quarterly 134.
[108] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103, 116.
[109] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103; Alan Bogg, 'The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness (2001) 64(6) Modern Law Review 875; Alex Gourevitch, 'Quitting Work but Not the Job: Liberty and the Right to Strike' (2016) 14(2) Perspectives on Politics 307, 308.
[110] Martin O'Neill and Stuart White, 'Trade Unions and Political Equality' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 14, 264ff.

There are regrettably many details left to explore, only some of which can be returned to in the next chapter. What is important to flag is that these connections exist, and that they are seldom averted to in the case law on trade union organising, recognition, bargaining and industrial action. This is at least in part because of an undue emphasis on ‘freedom of association’ as the guiding normative principle in this area, as will be shown in the next chapter.

CHAPTER 7:
IRELAND: PARTICIPATION WITHIN THE WORKPLACE

Introduction

The last chapter introduced a number of important concepts that this chapter will explore further. First, we saw the complementarity of industrial democracy and political democracy. It was stressed that not only does participation in industrial democracy help workers become better able to participate in politics – become better citizens – but that the status of citizenship (as opposed to slavery) entitles citizens to participate in decisions about production in which they are involved. That chapter also established that how participation in productive decision-making should be implemented in practice will vary across societies – even across industries and enterprises – and should in any event take the form of a 'mixed constitution' (albeit with a special role for trade unions). It was suggested that at stake in the constitutional position of worker-representative organisations and collective action is the legitimacy of mechanisms for facilitating participation more broadly. This is not always appreciated from the perspective of a liberal constitutionalism that views industrial relations through the prism of 'freedom of association', as the approach of the Irish courts will show.

This chapter examines how participation should be facilitated in practice, within the workplace. Again, the thesis is not overly prescriptive in this respect. What follows is the use of Irish constitutional jurisprudence as a test case to illustrate the sorts of issues that are likely to arise within any constitutional settlement in the area of worker representation and participation, and to extract lessons on how to deal with the key concerns identified in Chapters 2 and 5 around horizontality, waiver and adaptation of rights within constitutional labour law. Specifically, this chapter looks at participation within the workplace, in the form of collective representation through trade unions, and fair procedures for workers in disciplinary proceedings.

Irish courts have treated these different aspects of worker representation and participation differently, as will be seen. It will be argued this differential treatment is unjustified, and that Irish courts have failed to appreciate the connections and complementarity between

them. But it must be borne in mind that, as explained in Chapter 1, doctrine is used to illustrate the theory developed in this thesis, and to inform our development of that theory by reference to how courts have balanced the issues that arise in practice, rather than doctrinal critique of Irish law on its own terms.[1] As such, none of the following sections claim to be exhaustive or comprehensive.

Collective labour law: from freedom of association to participatory citizenship

It was suggested in the previous chapter that the conventional formulation of a 'right to freedom of association' does not adequately capture the normative and constitutional issues at stake in disputes about the representation of workers and activities of trade unions. To the extent courts follow an approach bounded by conventional understandings of 'freedom of association' as a guiding principle, jurisprudence on this subject will be lacking. This is certainly the case in Ireland, as will be shown here. This section will take Irish constitutional jurisprudence on trade union activity as the exemplar of the 'classic' model of worker representation and collective action – voluntary collective bargaining by means of trade unions, supported by recourse to industrial action. In order to establish the value of a constitutional labour law based on citizenship, we must expose the limitations of freedom of association as a conceptual lens to examine the constitutional position of worker representation and collective action.

The limits of 'freedom of association'

Ireland is widely considered to have a strong tradition of 'voluntarism' in industrial relations.[2] This thesis does not invest too much in that particular terminology, but it functions as rough descriptor of the Irish approach to industrial relations, at least on a constitutional level. An important point needs to be made in this respect: the actual practice of trade unionism in any jurisdiction is likely to be more heavily determined by statutory frameworks for industrial relations, which in Ireland provides a definition of 'trade

[1] Although the author would certainly like to see reform in this area of Irish constitutional law on the lines expounded here.
[2] For general discussion of the Irish law of industrial relations, see; Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985); Michael Forde, *Industrial Relations Law* (Round Hall 1991); Adam Elebert, 'Striking a Balance: Freedom of Association in Ireland and Germany' (2020) 38(6) Irish Law Times 80.

dispute', legal consequences and immunities associated with the existence of a trade dispute, governance procedures to be followed by trade unions in respect of balloting of members, *etc*. This statutory framework, of course, must exist within constitutional parameters. This thesis is concerned specifically with *constitutional* labour law, so its focus is firmly on the constitutional implications of, and limitations on, industrial action. It does not argue for a specific constitutional 'right' to a particular model of labour relations;[3] indeed, an excessive focus on 'rights' leads to a desiccated view of the constitutional position of worker representation and collective action. The thesis instead constructs a new theoretical approach, at the level of constitutional principle, to examining questions that will arise in any constitutional democracy about worker representation and collective action. This theory will help determine the appropriate scope of the rights of the actors involved, but will equally speak to other aspects of constitutionalism that do not reduce to individual rights, and may also inform statutory intervention in industrial relations to give effect to constitutional principles (although this will not be considered in great detail).

The position in Irish constitutional jurisprudence as it stands can be summarised as follows.[4] First, most of the jurisprudence in this area is driven by interpretation and application of Article 40.6.1.iii of Bunreacht na hÉireann,[5] which provides:

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality… the right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.[6]

This provision clearly gives only very qualified protection to the right to freedom of association. In particular, there is substantial latitude given to the state to regulate the conduct of industrial relations. Workers are free to form or join trade unions, but their 'right' to join any particular existing union is circumscribed by the general freedom of that

[3] *Cf* Brian Langille, 'Why are Canadian Judges Drafting Labour Codes – and Constitutionalizing the Wagner Act Model?' (2009-10) 15(1) Canadian Labour & Employment Law Journal 101.
[4] A more detailed examination of key issues will follow in this chapter. For a broader perspective within the context of historically influential theory, see Gerry Whyte, 'Catholic Social Teaching and Freedom of Association in Ireland' (2019) 108 Studies 421.
[5] The Irish Constitution.
[6] It should be noted that according to Article 40.6.2, such laws may contain 'no political, religious or class discrimination'. However, there are no examples of this caveat being used to strengthen trade union rights.

union to refuse them membership. Workers retain a right *not* to join a particular trade union or any union at all; the operation and enforcement (whether by the employer or the union) of a closed shop is unconstitutional.[7] Workers and their unions may engage in collective bargaining with employers, with resort to industrial action if necessary, but it is unclear to what extent these activities have free-standing constitutional protection apart from the statutory protections granted in various industrial relations legislation. In any event, statutory protections for trade union activities are limited by the constitutional rights of other workers (both inside and outside the union), customers or service users (in certain circumstances), and employers, which significantly constrain the rights to strike and picket. Employers are not obliged to recognise or bargain with any union. It has even been suggested in one case that employers have a constitutional *right* not to be forced (whether by statute or industrial action) to bargain with a trade union.[8] Given this very attenuated constitutional protection, instances of collective rights being directly asserted or relied on to enhance the scope of legally-permissible trade union activity are rare, and statutory industrial relations machinery has rarely been subject to constitutional review in those terms.[9]

It was suggested above that the Irish model of industrial relations might best be described as constitutionally-enshrined voluntarism. The current position has its roots in one of the earliest challenges to legislation on the grounds of constitutionality (and one of the few significant 'vertical' invocations of freedom of association) in this jurisdiction, *National*

[7] This was doubted by Henchy J (dissenting) in *Becton, Dickinson & Co Ltd v Lee* [1973] IR 1, at least in respect of pre-entry closed shops; this will be discussed further below. His reasoning was not followed in any subsequent cases, though the matter has never been dealt with directly. Despite this, there is an indication in *O'Connell v Building & Allied Trades Union* [2014] IEHC 360 that 'shadow' closed shops still operate in some industries.

[8] This was claimed *obiter* by Geoghegan J in *Ryanair v Labour Court* [2007] IESC 6. It has not been determined in any subsequent case; *Ryanair* itself will be discussed further below. For reasons that will be returned to in Chapter 8, the judgment in *Ryanair* is unlikely to preclude state support for collective bargaining. On the other hand, case law has also cast significant doubt on whether it is constitutionally permissible to make collective agreements binding on other employers within the sector who did not sign up to the original agreement; though again, there are signs of a more accommodating approach in the most recent case on the subject (discussed in Chapter 8).

[9] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.171] point out 'A striking feature of litigation… is that it has almost invariably concerned the protection of individuals in their relations with trade unions rather than the protection of organised labour in its relationship with the State or against employers pursuing anti-union policies.' However, this quotation undersells the extent to which a significant proportion of the litigation is in fact driven by 'employers pursuing anti-union policies', relying on constitutional principles to restrain picketing in particular.

Union of Railwaymen v Sullivan.[10] Much academic ink has been spilled over that decision in the seventy years since it was handed down.[11] This thesis will not rehearse all of the criticism that has been levelled at that decision. Rather, it will draw out its understanding of 'freedom of association' as representative of the broader trend.

The background to *NUR* can be summarised as follows: the industrial relations landscape of early twentieth-century Ireland was characterised by a proliferation of small trade unions. The State sought to pursue a policy of rationalisation, whereby a statutory Trade Union Tribunal could designate a particular union in each sector of the economy as having the exclusive 'right to organise workmen of a certain class'.[12] Only a union that already organised a majority of workers within that sector could apply for this designation.[13] Once a union was so designated, other unions were prohibited from accepting as members any workers within that sector, nor could any new unions be established by workers within that sector.[14] The applicant was a minority union in the transport sector; the Tribunal granted a rival larger union a sectoral monopoly, and the applicant sought to have the legislation providing for rationalisation invalidated.

The Court noted first that no evidence had been adduced that the relevant legislation was intended to prohibit unions that operated contrary to 'public order and morality', such as to engage the general saver in Article 40.6.1.[15] As such, the legislation fell to be considered under the specific qualification to Article 40.6.1.iii, that freedom of association could be subject to 'regulation and control in the public interest'. The Court determined, however, that the relevant legislation did not merely regulate or control the right to freedom of association, but abolished it altogether for those workers who did not wish to join the designated majority union.[16]

The first thing that should be observed is that the Supreme Court decision in *NUR* is a remarkably short judgment for a case which deals with such important questions of

[10] [1947] IR 77.
[11] See, for example: Michael Forde, *Industrial Relations Law* (Round Hall 1991); Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985).
[12] [1947] IR 77, 97.
[13] [1947] IR 77, 99.
[14] [1947] IR 77, 99.
[15] [1947] IR 77, 101.
[16] [1947] IR 77, 102.

principle. There is very little consideration given to the nature of freedom of association and the representation of workers. Murnaghan J expressed this understanding of the role of freedom of association in labour relations:

> [T]he object of the [legislation] was to limit the number of trade unions and to prevent certain trade unions from accepting new members…[17]

> [Article 40.6.1.iii] means that, subject to public order and morality, each citizen is free to associate with others of his choice for any object agreed upon by him and them… If this right of the citizens stood unqualified, it is clear… that these provisions [would be] inconsistent with any unqualified right of free association.[18]

> [The legislation] does not prohibit all association, but it purports to limit the right of the citizen to join one or more prescribed associations… Any such limitation does undoubtedly deprive the citizen of a free choice of the persons with whom he shall associate. Both logically and practically, to deprive a person of the choice of the persons with whom he will associate, is not a control of the exercise of the right of association, but a denial of the right altogether.[19]

From the very beginning, Murnaghan J fell into error. The 'object' of the legislation was not to limit the number of trade unions and prevent certain unions from accepting new members. As Gavan Duffy J had stated in the High Court judgment under appeal, the *object* was to strengthen the power of trade unions to bargain collectively – the *means* were to limit the proliferation of unions.[20] Gavan Duffy J's analysis has more than an echo of a modern proportionality test to it, acknowledging the difference between legitimate aims and appropriate means: 'The method chosen by the Oireachtas is not arbitrary; the motive is clear… The Act seeks to strengthen the stronger bodies, and in the fortifying process, includes a restriction on competitive organisation…'[21] Whether these were appropriate means, or the least restrictive, is a separate question: the Supreme Court had already strayed into error at the point of assessing the purpose of the legislation. Moreover, subsequent case

[17] [1947] IR 77, 99.
[18] [1947] IR 77, 101.
[19] [1947] IR 77, 102.
[20] [1947] IR 77, 86-89.
[21] [1947] IR 77, 88 (emphasis added). The Oireachtas is the Irish Parliament.

law has not followed this restrictive understanding of the state's powers in this area. In *Aughey v Ireland*,[22] the Court upheld a statutory limit on the number of organisations that could represent members of An Garda Síochána for the purposes of influencing pay and conditions, as merely restricting the activities of organisations rather than prohibiting their existence or preventing people from joining them. This distinction from *NUR* has been criticised as 'somewhat artificial',[23] but *NUR* has not been overruled.

There is a deeper problem with Murnaghan J's analysis, in its theoretical conception of 'freedom of association': 'subject to public order and morality, each citizen is free to associate with others of his choice for any object agreed upon by him and them'.[24] 'Freedom of association', at least when expressed and understood in these terms, is a profoundly limited conception of the constitutional issues at stake in the relationship between organised labour and employers.[25] 'Freedom of association' in the sense elaborated by Murnaghan J in *NUR* might well convey some of the things we want in a liberal democratic constitutional order – and certainly the same textual provision has been invoked in the context of political parties and other social organisations and clubs.[26] But as a constitutional hook on which to hang representation and collective action of workers, to facilitate effective participation in decisions about the administration of production, it has proven remarkably brittle. It has cemented a resolutely voluntarist model of industrial relations,[27] which assumes to a remarkable extent the existence of 'Twin Giants' relying on industrial strength alone in a

[22] [1989] ILRM 87.

[23] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.229]. An Garda Síochána is the national police force of Ireland. The authors of *Kelly* also refer to the case of *PMPS v Attorney General* [1983] IR 339, in which legislation regulating the banking industry, which made it impossible for the plaintiff business to operate (in purported violation of the shareholders' rights to freedom of association) was upheld. The Supreme Court extended a generous scope to the state to regulate organisations in the public interest, which was not apparent in *NUR*, despite the fact that the legislation in *NUR* had merely prevented minority unions from recruiting new members, without closing them down or preventing them from carrying out their ordinary activities on behalf of existing members. This appears to be a less significant restriction than in the *PMPS* case.

[24] [1947] IR 77, 101. As set out above, it need not concern this thesis whether the appropriate 'remedy' for the weakness in Irish law in respect of worker representation is a judicial reinterpretation of the relevant constitutional provision, or amendment of the Constitution. There might be good reasons from the perspective of democratic legitimacy, the separation of powers and legal certainty to prefer the latter. What matters for the purposes of this thesis is to develop a theory to inform what the constitutional position should be – irrespective of how it gets there.

[25] Daryl D'Art, 'Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility?' (2020) 63 Irish Jurist 82, 84, 86.

[26] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.197]ff.

[27] Irene Lynch, 'Lawyers and Unions – The Right to Freedom of Association in the Irish Constitution' in Tim Murphy and Patrick Twomey (eds), *Ireland's Evolving Constitution, 1937-97: Collected Essays* (Hart Publishing 1998) ch 16.

clash of wills over terms of employment.[28] This has had all sorts of undesirable consequences in the practicalities of union organising, collective bargaining, and industrial action, each of which will be examined in turn below.[29] A better normative basis for trade union activity is to be found in citizenship; why that is the case will become clear as the flaws in the Irish jurisprudence on freedom of association are exposed.

(a) Organising

Irish jurisprudence in this area 'has almost invariably concerned the protection of individuals in their relations with trade unions'.[30] We will focus on those cases where the courts have struck down 'closed shop' arrangements, on the basis of the constitutional right of an individual worker to disassociate from a particular, or any, trade union. Only limited reference will be made to the jurisprudence on the relationship between a worker and a union of which he is, or wants to become, a member.

The leading authority on this point remains *Educational Company of Ireland v Fitzpatrick (no 2)*.[31] In this case, a group of workers who were members of a trade union refused to work with non-unionised workers. When the plaintiff employer declined to oblige the non-unionised workers to join the union on pain of dismissal, the unionised workers called a strike and picketed the employer's premises. The employer sought an injunction to restrain the picketing. A later section will explore in more detail the protection for strikes and pickets in themselves. For present purposes, we need to analyse the views of the judges on the substantive claim to a right to disassociate from trade union activity. The leading judgment was given by Kingsmill Moore J, who identified three rationales in support of a right to disassociate: first, the right to freedom of expression includes 'the right not to be

[28] Philip Toynbee, 'The Language of Inequality' in Robin Blackburn and Alexander Cockburn (eds), *The Incompatibles: Trade Union Militancy and the Consensus* (Penguin Books 1967). Oisín Quinn, 'Existing Duties on Employers to Consult with Trade Unions' (1999) 4(6) Bar Review 305 describes the present situation as 'regulated voluntarism' in light of legislative reforms during 1970s and 80s. It should be noted, however, that Irish industrial relations is 'no mere clone' of the traditional British approach to industrial relations so memorably described by Kahn-Freund as 'collective *laissez-faire*': see Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985) x.

[29] The so-called 'service functions' of trade unions are not examined here – with the exception of representing workers in disciplinary proceedings (the subject of the next section), these are not particularly significant for the present thesis.

[30] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.171].

[31] [1961] IR 345.

forced to join a union or association professing, forwarding, and requiring its members to subscribe to' beliefs one does not hold; second, the right to private property precludes being 'forced against [one's] will into a union or association which exacts from him a regular payment'; and third, 'a right to form associations and unions is only intelligible where there is an implicit right to abstain from joining such associations or unions'.[32]

Each of these reasons might be questioned on their merits,[33] but the important thing to note for present purposes is that the Court clearly staked out an inherent tension between a right to associate and a right to disassociate. In the view of the Court, the legitimate sphere of trade union organising takes place within a balance of these two opposing rights. Although at first glance this seems superficially attractive, we are left none the wiser about *how* to balance the rights, and in which circumstances it is acceptable to restrict one right to facilitate the other.

In *Becton, Dickinson & Co Ltd v Lee*,[34] Henchy J tried to justify pre-entry closed shops as constitutional on the grounds of freedom of association itself:

> Here the matter is one of contract and there is no compulsion or coercion, and no interference with the citizen's free choice. All that is provided is that, if the workman enters into employment with a particular employer, he must be a member of a designated union. That may mean, as apparently it does in the present case, that the workman cannot remain a member of another union. If that be the result, then it stems from the citizen's free choice. Not alone is it not in derogation of his constitutional right, it is in exercise of that very right… One has only to look at the society in which we live to see the many classes of people who by contract have limited, in one degree or another, their choice of association or union.[35]

The most obvious problem is that nothing in Henchy J's treatment of the issue would preclude an employer making it a 'condition precedent'[36] to employment that the worker

[32] [1961] IR 345, 395.
[33] Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985) 9.
[34] [1973] IR 1.
[35] [1973] IR 1, 48.
[36] [1973] IR 1, 43. The 'condition precedent' approach was rejected by the majority in *Becton*: see the judgment of Walsh J at 25-26.

be a member of a 'yellow' union under his control, or indeed no union at all – or, for that matter, a religious, political, or any other kind of organisation the employer supports. His distinction between a contractual imposition by an employer on the one hand being 'a matter of free choice' for the worker, and imposition of statute or a picket on the other being 'compulsion or coercion' must be doubted, in light of the discussion in Chapter 3. So whatever the merits of Henchy J's analysis as a matter of Irish constitutional law, it is not a sustainable basis for the present theory of constitutional labour law based on citizenship. In any event, this comment was *obiter* in a dissenting judgment; this line of reasoning has not been picked up in subsequent cases, and the authors of *Kelly* suggest that the Irish courts are likely to defer to the decision of the European Court of Human Rights in *Sørensen and Rasmussen v Denmark*[37] disapproving of pre-entry closed shops.[38]

Ultimately, the concept of 'association' on its own struggles as a guiding normative principle in this area. The first fundamental difficulty becomes clear in the dissenting judgment of Maguire CJ: 'The [unionised workers] are exercising the right which they have of refusing to associate [at work] with workmen who are not members of their Union.'[39] The imposition of a closed shop is as much an act of disassociation from non-union members as it is an act of association between trade unionists. In fact, it must be the case that all acts of association with *some* people are necessarily acts of disassociation from others.[40] Framed like this, it is difficult to see how respective rights on the parts of unionised and non-unionised workers to disassociate from each other can be reconciled at all. Second, these are only acts of association and disassociation *for certain purposes*, but not for others. On its face, this makes the position of the non-unionised workers appear more reasonable: they are not asserting a right to disassociate from their unionised colleagues *per se*, because they are perfectly willing to still work with them. However, this leads to the third point: in fact, the unionised workers are also advancing a conditional claim. They have no objection in principle to associating with the non-unionised workers either. All they are asserting is that they will not associate with anyone (at work) who does not want to associate with them (in a union). They want to control whom they associate with at work – or more precisely, the terms on which they associate with people at work (since they are not asserting any

[37] Applications nos 52562/99 and 52620/99.
[38] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.178], fn 360.
[39] [1961] IR 345, 382.
[40] See the comments of Hardiman J in *Equality Authority v Portmarnock Golf Club* [2009] IESC 73.

general claim to control hiring decisions, simply that whoever is hired be a member of the union).

So the dispute is not over association and disassociation, but rather over the *terms* of association, in a particular context. In this respect, the closed shop cases are not all that different from the cases in which workers have tried to join unions that do not want to accept them as members. By and large, both the Irish courts and the European Court of Human Rights have upheld the rights of unions to set the terms on which they will accept newcomers – *ie*, the rights of the union members to set the terms on which they will associate with others.[41]

In striking down the closed shop, those same courts implicitly hold that workers have no concomitant right to a say over who they work with, and on what terms. That poses difficulties for champions of 'freedom of association'. One way to reconcile these principles is to say that working with others is not an act of 'association' within the meaning of the right to freedom of association. But in most workplaces, employees will be obliged to regularly communicate with each other; they might have to wear the same uniform or be present in the same location or at the same events; sometimes they will have to build on work that others have done, or others will have to build on theirs. Both unionised and non-unionised workers are still members of the same community of the workplace. They will be treated as such in both legal and social terms, not least by their employer. Indeed, in *Collins v Cork County Vocational Education Committee*,[42] the Supreme Court held that workers have no constitutional right to refuse to meet with colleagues during the course of their work,[43] even where their objection relates to the union activity of those colleagues.[44] So clearly it is not the concept of 'association' that is doing the normative heavy lifting here. The relevant constitutional value must mean something other than that 'each citizen is free to associate with others of his choice for any object agreed upon by him and them'[45]

[41] See for example: *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254; *ASLEF v United Kingdom* Application no 11002/05.
[42] [1983] 3 JIC 1804.
[43] [1983] 3 JIC 1804, [39]: 'acceptance of employment necessarily and daily involves compliance with orders or requests by the superior of the officer or employee concerned to meet with, liaise with and deal with colleagues employed in the same organisation. There can be no substance at all in a suggestion that such part of the duties of a person's profession or employment is in any way an infringement or a restriction of their Constitutional right of freedom of association.'
[44] [1983] 3 JIC 1804, [14].
[45] *NUR v Sullivan* [1947] IR 77, 101.

after all. It is argued here that it is really a question of control, not association: who controls the terms on which people associate at work – employers, or workers through their trade union?[46] Before fleshing that out, we need to examine other areas of trade union activity.

(b) Recognition and collective bargaining

In the last chapter, we said trade unionism is a means of worker participation in decisions about production. But that is not how the relationship between unions and employers is conceived in Irish constitutional law. Cases in this area remain bound by a paradigm of 'freedom of association' that is fundamentally dissatisfying. This section will illustrate these problems by reference to two closely-connected elements of this relationship: recognition and collective bargaining. Unlike many other jurisdictions, there is no statutory obligation on Irish employers to recognise trade unions for the purposes of collective bargaining.[47] Of itself, that is not specifically relevant to the present investigation of constitutional labour law. However, it becomes relevant in the Irish context because at least one reason why is there no such obligation involves constitutional issues.

Certainly, there is no constitutional obligation on employers to bargain with trade unions; put another way, any purported 'right' of workers to engage in collective bargaining through a trade union does not extend to a duty on employers to recognise the union – it is at best a Hohfeldian 'privilege'.[48] This can be seen in *EI Co Ltd v Kennedy*,[49] where a trade

[46] As will be discussed below, this thesis is not arguing that a citizenship-based theory of constitutional labour law requires closed shops be accepted. We are simply saying at this point that 'freedom of association' cannot serve as a sustainable answer to the closed shop question. Of course, closed shops have not typically been portrayed, even by trade unionists, as being about workers making decisions over whom they work with – Maguire CJ's right to disassociate from non-unionists. They are generally defended on more instrumental grounds: closed shops mean higher union membership, which means greater bargaining power: see Daryl D'Art 'Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility?' (2020) 63 Irish Jurist 82, 84-85; Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work* (Hart Publishing 2014) ch 15. There is plenty of evidence to the effect that closed shops are not necessary for high membership, nor for bargaining strength: see the example of Denmark in Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021) 27ff. It is possible that union resort to at least some of the tactics that have drawn the ire of constitutional courts could be obverted by pre-emptive state intervention in support of collective bargaining.
[47] Adam Elebert, 'Striking a Balance: Freedom of Association in Ireland and Germany' (2020) 38(6) Irish Law Times 80.
[48] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) The Yale Law Journal 16, 32ff. Of course, the employer, on this view, similarly has a privilege to engage collective bargaining (or not).
[49] [1968] IR 69.

union had called a strike and instituted a picket on the plaintiff employer because the latter had refused to meet with representatives of the union to negotiate terms of employment for its members. The employer sought an injunction restraining the picket. Although the Supreme Court ultimately refused the order sought, Walsh J made the following comments in respect of the trade union's underlying claim: 'In law an employer is not obliged to meet anybody as the representative of his worker, nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make.'[50]

In *Dublin Colleges Academic Staff Association v City of Dublin Vocational Education Committee*,[51] a group of workers sought orders that they were 'entitled to be represented by the Association in all negotiations relating to the terms or conditions of their employment… with the Defendants' and 'compelling the Defendants to negotiate with the Association in relation to the terms and conditions of employment of… the persons they represent'.[52] These were rejected by the Court, Hamilton J writing:

> [T]he Plaintiffs have, of course, the constitutional right to form and join any union or association of their choice and they exercised that right. There is, however, no corresponding obligation on anybody or person, such as the Defendants herein, to recognise that association for the purpose of negotiating the terms and conditions of employment of its members or for any purpose.[53]

The position set out in these cases is not strictly accurate. As will be explained in the next section, Irish courts have held that workers are generally entitled to be accompanied by a trade union official in disciplinary proceedings, as a matter of the constitutional guarantee of fair procedures in the conduct of those proceedings. The amounts in effect to an obligation on an employer to 'recognise' a trade union as 'representative' of its workers for *some* purposes[54] (indeed, *pace* Walsh J in *EI Co Ltd v Kennedy*, there are cases where employers are obliged to meet other people, like solicitors, as representatives of their

[50] [1968] IR 69, 89.
[51] [1981] 7 JIC 3101.
[52] [1981] 7 JIC 3101, [14]-[15].
[53] [1981] 7 JIC 3101, [26]. Similarly, in *Abbott and Whelan v the Irish Transport and General Workers Union* (1982) 1 JISLL 56, the Court expressly denied that 'there is a constitutional right to be represented by a union *in the conduct of negotiations* with employers', agreeing with the decisions already referred to that there 'is no duty placed on any employer to *negotiate* with any particular citizen or body of citizens' (emphasis added).
[54] See also Niamh Howlin and Robert C Fitzpatrick, 'The Feasibility of Mandatory Trade Union Recognition in Ireland' (2007) 29 Dublin University Law Journal 178.

workers). The question arises, then, as to whether there is a sustainable distinction between recognising trade unions as representative of workers for *individual* disciplinary proceedings, and *collective* negotiations on terms of employment. This question will be returned to later in this chapter.

Subsequent case law has generated additional problems by apparently extending this principle even further. The decision in *Ryanair v Labour Court*[55] is something of a *bête noire* for Irish labour law scholarship.[56] The plaintiff is an airline operator with a historic reputation of reluctance to engage with trade unions,[57] which had selected certain pilots to undergo training to fly a new type of aircraft. Objecting to some of the conditions associated with this training programme, the pilots' trade union petitioned the Labour Court to intervene. Geoghegan J said: 'It is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so.'[58] He also said that any industrial relations legislation 'must be given a proportionate and constitutional interpretation so as not unreasonably to encroach on Ryanair's right to operate a non-unionised company.'[59]

Again, without engaging in internal critique of Irish law, such a claim certainly is 'in dispute'.[60] As will be returned to below, it cannot be the case that an employer is 'perfectly entitled not to *deal with* trade unions', if there are circumstances in which they are constitutionally required to allow trade union officials to accompany workers into internal disciplinary proceedings. At most it may be that employers are entitled not to *negotiate* with trade unions over terms and conditions of employment (however this might be

[55] [2007] IESC 6.
[56] See for example: Michael Doherty, 'Union sundown? The Future of Collective Representation Rights in Irish Law' (2007) 4 Irish Employment Law Journal 96, 'When You Ain't Got Nothin', You Got Nothin' to Lose... Union Recognition Laws, Voluntarism and the Anglo Model' (2013) 42(4) Industrial Law Journal 369, and 'New Morning? Irish Labour Law Post-Austerity' (2016) 39(1) Dublin University Law Journal 51.
[57] See, for example, [2007] IESC 6, [29]ff: 'There is a kind of anger expressed by [the representative of the employer] … [H]e makes clear that Ryanair "strenuously objected to the referral by [the trade union] which it saw merely as an attempt to compel it to negotiation with this union and to allow it to intermeddle in the affairs of the company."'. In recent years, Ryanair has been more willing to engage with unions in some jurisdictions: Padraic Regan, 'What Ryanair's recognition of unions means for the future of the airline' *The Conversation* (18 December 2017) <https://theconversation.com/what-ryanairs-recognition-of-unions-means-for-the-future-of-the-airline-89326> accessed 30 June 2022. Regan reminds us that the high-profile CEO of Ryanair, Michael O'Leary, 'once threatened to "cut off his own hands" rather than sign a deal with a trade union'.
[58] [2007] IESC 6, [58].
[59] [2007] IESC 6, [58].
[60] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.195] observed that Geoghegan J's *dictum* is 'legally problematic'.

defined). However, commentators have pointed out that this is also unsustainable: if employers enjoy a 'right to operate a non-unionised company', then not only can 'a law [not] be passed compelling it to' recognise trade unions, but neither can trade unions take industrial action to force recognition and negotiation.[61] This is the inevitable implication of the jurisprudence (which will be set out below) that makes it unconstitutional to take industrial action that interferes with the constitutional rights of another. Such a result would quite clearly be in breach of Article 11 ECHR. In *Wilson and others v United Kingdom*,[62] the ECtHR held that if a system of industrial relations is to be voluntary in nature (that is, if there is to be no legal obligation on employers to recognise trade unions), then trade unions must have broad freedom to take 'industrial action, with a view to persuading the employer to enter into collective bargaining'.[63]

(c) Industrial action

The bulk of constitutional cases involving trade unions have been taken by employers to prevent unions from taking industrial action, in particular to restrain pickets. In turn, in most of those cases the underlying reason for the picket has been to enforce a closed shop or to compel recognition. As mentioned above, the general position is that although workers are entitled to strike for any reason, they are not entitled to mount a picket or otherwise encourage others to take industrial action where the action would interfere with anyone's constitutional rights. The courts have endorsed the 'suspension theory' of strike action in respect of contract,[64] and additional protection against tort liability for inducing strikes, and pickets, is found in statute. The *constitutional* position of striking and picketing is less clear: strikes themselves tend to be protected as a corollary of the right to work (*ie*, the right not to work),[65] but the constitutional protection for picketing (though obviously engaging rights

[61] On the assumption, already proven in respect of Ireland, that constitutional rights are capable of applying horizontally: see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.195].
[62] Applications nos 30668/96, 30671/96 and 30678/96.
[63] Applications nos 30668/96, 30671/96 and 30678/96, [46]. Likewise in *Demir and Baykara v Turkey* Application no 34503/97, [143] the Court said: 'The union ha[s] to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members…'.
[64] *Becton, Dickinson & Co Ltd v Lee* [1973] IR 1, 35 (Walsh J); *Bates v Model Bakery Ltd* [1993] 1 IR 359, 369-70 (O'Flaherty J), 372-73 (Egan J).
[65] See, for example, the comments of Kingsmill Moore J in *Educational Company of Ireland Ltd v Fitzpatrick (no 2)* [1961] IR 345, 397: 'It was suggested in the course of the hearing that, if picketing in aid of a strike to force men into a union could be restrained by injunction, so equally could the strike itself be restrained. [But] the claim to picket and the claim to strike seem to me to involve very different considerations. The right to dispose of one's labour and to withdraw it seem to me a fundamental personal right which, though not

to freedom of expression and assembly) seems to be coterminous with statutory protection.[66]

The reasoning for this runs as follows: picketing amounts to a 'watching and besetting'[67] and is illegal at common law. As such, it is only legal because and to the extent that the legislature has created limited statutory immunity, originally under the Trade Disputes Act 1906. In order to have survived the enactment of the Constitution in 1937, the 1906 Act must only be interpreted in compliance with various rights protected by the Constitution. Therefore, any industrial action which interferes with those rights must be outside the scope of the Act, and illegal.[68]

This approach has been disputed: the authors of *Kelly* draw attention to cases which have suggested a distinction between striking and picketing, which enjoy standalone constitutional protection, and other forms of industrial action, which do not.[69] But the stricter line has been followed repeatedly in the jurisprudence: for example, in *Murtagh Properties v Cleary*,[70] the plaintiff employer obtained an injunction restraining a picket in circumstances where the union sought to exclude women from employment in the plaintiff's pub.[71] It should be observed that these cases involved an employer invoking the rights of third parties (his workers), whereas other cases have involved non-unionised workers seeking damages from the union for their exclusion from a workplace on the basis

specifically mentioned in the Constitution as being guaranteed, is a right of a nature which I cannot conceive to have been adversely affected by anything within the intendment of the Constitution.' As will be suggested below, strikes are better conceived as the exercise of a veto over production, as part of participation in productive decision-making.

[66] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.154]-[7.6.159]; Michael Forde, *Industrial Relations Law* (Round Hall 1991) 21.

[67] As Kingsmill Moore J put it in *Educational Company of Ireland Ltd v Fitzpatrick (no 2)* [1961] IR 345, 389-90: 'That picketing as ordinarily conducted interferes very seriously with the user and enjoyment of the premises picketed and amounts to a common law nuisance can hardly, I think, be contested… picketing is, in the words of counsel in this case, "a murderous weapon" …'.

[68] *Per* Kingsmill Moore J in *Educational Company of Ireland Ltd v Fitzpatrick (no 2)* [1961] IR 345, 396-97: 'pressure designed to deprive me of a right given me by the Constitution is against the spirit of the Constitution; but certain forms of pressure do not come within the province of the law to restrain… It is a very different matter when the Legislature intervenes to authorise or facilitate coercion by attempting to legalise acts, directed to that end, which previously were illegal and restrainable. Unconstitutional to my mind would be a statute which purported to legalise acts of a nature previously illegal and restrainable by law, in so far as such acts were legalised when used for a purpose of interfering with rights guaranteed by the Constitution…'

[69] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.3.275]ff.

[70] [1972] IR 330.

[71] Obviously, not a sympathetic cause for any trade union to adopt, even making allowances for 1970s Ireland. See also *Crowley v Cleary* [1968] IR 261.

of a closed-shop policy,[72] or (in limited circumstances) service users seeking damages for loss of access to the service provided by the employer.[73] The approach followed by Kingsmill Moore J above is the only way to get around the problem of *ius tertii*: perhaps the picket does interfere with the right to disassociate of non-unionists or some rights of customers, but the employer cannot invoke *their* rights to obtain the injunction. However, the employer is *prima facie* entitled to an injunction against any industrial action not protected by statute, because that action is illegal at common law. This continues to apply now that the 1906 Act has been replaced by the Industrial Relations Act 1990.

The fundamental problem with this analysis is that there is no discussion whatsoever of whether the *common law* prohibition on picketing survived the enactment of the Constitution. As a matter of doctrinal Irish law, that is no small beer;[74] however, it is beyond the scope of this thesis to argue it in full. Suffice to say that Irish courts have generally assumed that picketing is a 'nuisance' and therefore 'restrainable', despite Kerr and Whyte criticising this as 'confusion of thought'; in the latter's view, picketing in itself is not a nuisance, and only becomes so if there is violence or intimidation.[75] In any event, they say peaceable picketing falls within the rights to freedom of expression and assembly in the Constitution.[76] This thesis takes a slightly different approach to justifying strikes and picketing within constitutional theory. We must recognise that the courts' assumption that picketing necessarily falls within the 'public order and morality' exception to freedom of expression and assembly, because it 'inevitably… interfere[s] with the business of the party picketed',[77] rests on a further implied assumption that workers and their representatives have no self-standing right to interfere with production. That is to say, that workers and their unions have no constitutional legitimacy to claim control rights over productive decision-making. This latter assumption must be challenged in order to properly conceive of the place of trade unions and their activities in a constitutional democracy. A theory of constitutional labour law based on citizenship allows us to mount that challenge, because citizenship entails participation.

[72] For example, *Cotter v Ahern* [1976-77] ILRM 248.
[73] *Crowley v the Irish National Teachers Organisation* [1980] IR 102; *Conway v INTO* [1991] 2 IR 305.
[74] Pardon the pun: *Murtagh Properties* involved an industrial dispute between publicans and bar staff.
[75] For discussion, see Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985) 283ff.
[76] Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985) 284.
[77] Tony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books 1985) 288.

Participation as a firmer foundation

It was argued in Chapter 6 that recognition of trade unions is an incidence of the obligations an employer has to his workers themselves, to respect the mutual citizenship workers and employers share within a constitutional democracy. From the perspective of citizenship, it is unsustainable to hold as a matter of constitutional labour law that an employer 'is not obliged to meet anybody as the representative of his worker, nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make.'[78]

It will be illustrated later that fair procedures in discipline and negotiation over terms are twin aspects of enterprise-level industrial relations, and that Irish courts should not treat them so divergently. In the meantime, we need to look at the issues raised above of closed shops and industrial action. It will be impossible to resolve every question that might arise in respect of the myriad forms industrial action might take, and all the dynamics of picketing. Some of these will arise again as issues of freedom of *expression* in Chapters 9 and 10, where it will be argued that unions and their members should enjoy a sort of 'parliamentary privilege' over expression made in the context of industrial action. Given that most of the cases that arise in Irish (and ECtHR) jurisprudence on the rights to strike and picket concern recognition disputes, the theory of this thesis should focus on the issue of recognition. Though the Irish courts have accepted that a strike or picket in pursuit of union recognition falls within the statutory immunity for a 'trade dispute',[79] they have rejected any suggestion that the right to 'freedom of association' on the part of workers generates any obligation on employers to recognise those unions for the purposes of collective bargaining – one case going so far as saying employers may have a right *not* to recognise unions. Even if we follow the authors of *Kelly* in casting this latter position as 'legally problematic',[80] a constitutional theory of union activity based on 'freedom of association' does not supply an obvious *normative* critique. This section makes the case for worker participation generating duties on employers and the state, on the basis of our theory of citizenship. That is not necessarily to say that there needs to be a justiciable individual

[78] *EI Co Ltd v Kennedy* [1968] IR 69, 89.
[79] *Becton, Dickinson & Co Ltd v Lee* [1973] IR 1.
[80] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.6.195].

right to trade union recognition – we have repeatedly made the case that reducing constitutional issues to 'rights' is inappropriate, and there are various ways this principle can be put into practice. But the legitimacy of union recognition and worker participation in decision-making must be provided for in the constitutional settlement, even if it is given precise form in statute. The rights to strike and picket to force recognition and determine the conduct of negotiations are, in this sense, instrumental to and therefore parasitic on the constitutional legitimacy of recognition and participation. These are best conceived as not withdrawal of labour *per se*, but as veto measures over production, where an employer has failed in his constitutional obligation to respect the citizenship of workers by involving them in decision-making about that production. It is therefore more important to focus in this thesis on the theory of worker participation in productive decision-making as an incidence of citizenship.

On this model, closed shop disputes are logically prior to other kinds of disputes over participation in productive decision-making. It is clear that the problem of closed shops cannot be resolved by reference to freedom of association alone. The underlying problem with that approach is that it is ultimately question-begging: it *assumes* that trade unionism and the workplace are distinct kinds of association, and that workers' 'freedom' in respect of the former must be greater than the latter. The core contention of this chapter is that this is not the appropriate way to understand trade union activity. Production, and decisions about how to produce, is what the workplace is all about. This points towards a much closer link between the association of workers with each other in a union and the association between those same workers in the productive process.

Trade unionism is a means for workers to participate in decisions about the administration of production. A trade union trying to enforce a closed shop is essentially the unionised workers asserting a say over what terms their colleagues are employed on – where the most important term for that purpose is that those workers will also participate in decisions about production by means of the trade union. They are an attempt by the union(ised workers) to control the working conditions of their colleagues, which is what collective, participatory regulation of employment is all about. Closed shops are an attempt to define the boundaries of the nested community of workers and employer that ought to participate in productive decision-making, and the mechanism by which that participation will take place

(exclusively *via* a particular union).[81] A closed shop policy gives power to define those boundaries and mechanisms to incumbent workers. Constitutional labour law that prohibits closed shops seems to accept that management alone decides who works at the business, not trade unions. The plaintiff in *Crowley v Cleary*,[82] another successful lawsuit by an employer to break a closed shop, put it best: 'I would like to fall in with [the union's] requirements as far as I can, but I don't want my house run by somebody else.'[83] We should be clear that is what the 'right to disassociate' means in the context of a closed shop: constitutional protection for a norm of managerial decision-making.[84] That, of course, is to be resisted. This does suggest that a model of productive decision-making with worker participation at its heart should be open to allowing closed shops.

But on balance, a theory of constitutional labour law based on citizenship does not need to embrace closed shops. Thinking about it from the perspective of the worker who does not want to join a (particular) union, we get the following picture: a worker who is happy to work alongside others but not join them in a union, is not 'disassociating' from them. He still participates in production with them, and as such will have to (a) make decisions about production that affect those others, and (b) be subject to decisions about production that affect those others as well as him. Where he differs from them is in respect of how he wants those decisions to be made, by whom, and the means by (or extent to) which he wants to participate in them. Given that our model of citizenship rules out submission to managerial control, we need some participatory mechanism. The issue, therefore, is not whether workers have a right not to join a union, but if they have a right to participate in decisions about production *via* some mechanism other than a (particular) union, in circumstances where most workers want the union to be the only mechanism for participation.

There are all sorts of reasons why an individual worker might not support a particular trade union, or indeed trade unionism in general. Some of these might be excluded from a theory of citizenship as justifications for signing a contract that undermines the public interest in democratic citizenship. However, good reasons from our perspective include the

[81] All democratic communities face these boundary problems: see David Miller, 'Boundaries, Democracy, and Territory' (2016) 61(1) American Journal of Jurisprudence 33.
[82] [1968] 1 IR 261.
[83] [1968] 1 IR 261, 264.
[84] Patrick Macklem, 'Property, Status, and Workplace Organizing' (1990) 40 University of Toronto Law Journal 74.

confessional nature of some unions (for example in France), positions of a union on important social issues (like the strike in *Murtagh Properties* against women being employed in pubs),[85] or union support for political parties. Though fragmentation can certainly weaken unions,[86] union pluralism can also be healthy. Chapter 9 will examine the importance of 'moral independence' for workers, allowing them to form their own beliefs on moral, social and political issues. Moreover, not being able to rely on closed shops gives an incentive for unions to be effective and attractive to workers in order to recruit members; pluralism allows for new unions to form that are more effective or representative of workers than existing ones.

Workers should therefore be free to participate in productive decision-making through means other than trade unions – which is one reason to support a 'mixed constitution' model of workplace democracy mechanisms.[87] Trade unions should not have free rein to force recalcitrant workers to join their organisations, if those workers want to participate in productive decisions some other way, and viable alternatives exist for that to happen. A robust system of workplace participation will allow unions to function like 'political parties' without undue fragmentation that undermines their ability to perform their democratic function. This thesis is not prescriptive as to the details of such a system, which is likely to vary across jurisdictions depending on workplace and industrial relations cultures. The theory of constitutional labour law advanced herein allows room for political decision-making to create a sustainable system of workplace democracy, provided it satisfies the level of participation that citizenship demands – just as with varieties of political system across states. None of this nuance is obvious from a conception of trade union activity built on 'freedom of association'; citizenship is a much more useful prism.

That concludes, for the moment, our discussion of collective representation. It leaves us with an intuition that the Irish courts have gone awry in their treatment of collective representation rights because they have missed the point that it should be about

[85] See also *Young, James and Webster v United Kingdom* Applications nos 7601/76 and 7806/77. Laura Bambrick also points out that trade unions supported the exclusion of married women from the civil service in Ireland (the so-called Marriage Bar) on the basis that it would raise wages for men: see 'Liveline' *RTÉ* (Dublin, 4 July 2022) <https://open.spotify.com/episode/7tZCDf98EI2BHOWlJRmKLL?si=qcixfuYXRn6wP4Sg76l7mQ> accessed 8 August 2022.
[86] This, indeed, was the rationale behind the legislation impugned in *NUR v Sullivan* [1947] IR 77.
[87] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24(2) Industrial Law Journal 103, 117-119.

participation, not association. What is particularly curious is that they have appreciated the value of participation in another context: fair procedures in disciplinary proceedings. We turn to discuss that now.

Individual discipline: fair procedures, representation and participation

The previous section showed what happens when courts neglect the value of participatory citizenship in favour of a model of industrial relations based on a right to freedom of association. It was argued that Irish law is deficient from our perspective of citizenship in this respect. However, what makes Ireland an interesting case study for this Part of the thesis is that the value of participation has not been entirely neglected in its constitutional labour law.

This section examines the doctrine on fair procedures in disciplinary proceedings. The next section argues that while there are distinctions between individual discipline and collective bargaining, they are ultimately driven by the same underlying values. They are two aspects of participation as it applies to enterprise-level decision-making. The Irish jurisprudence on fair procedures is also extremely useful to us because here the courts have grappled with questions around horizontality, waiver and the adaptation of rights for the workplace context, as opposed to how they apply against the state.

The right to fair procedures

In comparison with other jurisdictions,[88] the Irish courts have shown a remarkable willingness to oblige employers to follow constitutionally-mandated, public-law standards of fair procedures in internal discipline and dismissal proceedings.[89] In Irish law, workers

[88] See, for example, *R (G) v Governors of X School* [2011] UKSC 30. That is not to suggest UK courts have no means of assessing the fairness of the procedures followed by employers; see for discussion Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018) 9, and *Putting Human Rights to Work* (Oxford University Press 2022) 158-59.
[89] For simplicity, together 'disciplinary proceedings'.

are entitled to 'natural and constitutional justice' in disciplinary proceedings as a personal constitutional right.[90] Laffoy J summed up the position in *McGlinchey v Ryan*:[91]

> It is well settled, as a matter of constitutional law and of contract law, that an employee who is involved in a disciplinary process in the course of his employment is entitled to be afforded fair procedures, although what constitutes fair procedures may vary from case to case.[92]

The practical consequences of constitutionalising fair procedures in this way appear twofold. First, fair procedures in decision-making cannot be abrogated by statute.[93] Second, there may be a remedy in damages for a failure to abide by fair procedures,[94] or an injunction to, for example, reinstate a worker suspended or dismissed on the basis of an unfair procedure.[95] An exhaustive catalogue of Irish superior court jurisprudence on the right to fair procedures in the employment context is beyond the scope of this thesis.[96] However, some of the most important judgments will be discussed, to illustrate the

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[90] The courts speak interchangeably of 'natural justice', 'constitutional justice' and 'the right to fair procedures'. It has always been unclear precisely what the latter two entail above the administrative law requirements of natural justice (*nemo iudex in causa sua* and *audi alteram partem*). See Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [6.1.160]: '…the concept of constitutional justice is not a redundant one, although it may be that in the majority of cases the fact that this concept is now rooted in the Constitution will not materially add to the range of protection available to the person affected…'. See also [6.1.155]; and see further Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [13-39], [13-43].

[91] [2010] IEHC 536.

[92] [2010] IEHC 536, [6.5].

[93] *Vehicle Tech Limited v Allied Irish Banks plc* [2010] IEHC 525. It remains to be seen whether the same can be said of abrogation by *contract*, or waiver; this will be discussed below. It is interesting to observe in relation to adaptability of rights to context, there has been some case law to the effect that the statutory functions of an administrative body might affect the substance of what counts as a 'fair' procedure for its decisions: see, for example, *Treasury Holdings and others v National Asset Management Agency and others* [2012] IEHC 297, [16]ff.

[94] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [6.1.158]; Desmond Ryan, *Redmond on Dismissal Law* (3rd edn, Bloomsbury 2017) [7.04].

[95] See, for example, *Bank of Ireland v Reilly* [2015] IEHC 241, and *Lyons v Longford Westmeath Education and Training Board* [2017] IEHC 272; but note the restrictive approach taken to prematurity in respect of employment injunctions in *Rowland v An Post* [2017] IESC 20.

[96] See Paula Murphy, 'Dismissal' in Ailbhe Murphy and Maeve Regan (eds), *Employment Law* (2nd edn, Bloomsbury 2017) [18.16]-[18.20], [18.51]; Desmond Ryan, *Redmond on Dismissal Law* (3rd edn, Bloomsbury 2017) [5.07]-[5.15], ch 7 (generally), [8.16]-[8.18]. See also Alan Eustace, 'If It Walks Like Misconduct and Quacks Like Misconduct… It's "Poor Performance"? *O'Donovan v Over-C Technology Ltd* [2021] IECA 37' (2021) 18(2) Irish Employment Law Journal 31, and 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming). For a comprehensive discussion of fair procedures generally, see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [6.1.63]-[6.1.160]; Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019), chs 13, 14, 15.

principles followed by the Irish courts in affording fair procedures to workers, and the practical benefits of the right to fair procedures. From this we will be able to see that courts do recognise the value of worker participation in decision-making in some contexts.

The following sub-sections will discuss three aspects of the right to fair procedures that have arisen in the case law and correspond to the issues raised in Chapters 2 and 5. These are: horizontality; the problem of waiver of the right by contract; and practical adaptations to the right to account for the realities of the employment relationship. The Irish case law is thus useful for informing the development and implementation of the theory in this thesis.

(a) Horizontality

The right to fair procedures in workplace disciplinary proceedings has its origins in *Glover v BLN Ltd*.[97] The plaintiff was a director of the defendant holding company and its three subsidiaries. His contract provided that he could be dismissed for misconduct by unanimous vote of the board of the holding company. Complaints of misconduct against him were considered by the board without being notified to him in advance, and he was given no opportunity to reply to these complaints. He was dismissed on foot of these complaints.

At common law, employees were not entitled to natural justice in respect of disciplinary proceedings unless provided for by contract.[98] Provision for fair procedures could only be implied into the contract in accordance with ordinary private law doctrines for the implication of terms.[99] In *Glover*, however, Walsh J held that 'public policy and the dictates of constitutional justice require that statutes, regulations *or agreements* setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.'[100]

[97] [1973] IR 388.
[98] *Glover v BLN Ltd* [1973] IR 388, 414-15 (HC, Kenny J), 431 (SC, Fitzgerald J dissenting); see also *Lupton v Allied Irish Banks Ltd* [1983] 10 JIC 2101; *Farrell v Minister for Defence* [1984] 7 JIC 1002; *Goldrick and Mooney v Dublin Corporation* [1986] 11 JIC 1001.
[99] *ie*, the 'business efficacy' and 'officious bystander' tests.
[100] *Glover v BLN Ltd* [1973] IR 388, 425 (emphasis added). It should be noted that Walsh J referred to 'decisions which may affect rights' in the context of applying fair procedures to a private employment contract, suggesting that from the beginning it was considered that dismissal necessarily engaged individual rights, at least for the purposes of applying fair procedures. There is an interesting comparison to be drawn with the following *dictum* of the ECJ in C-43/75 *Defrenne v SABENA*, [39]: 'In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action

Glover was confirmed by the Supreme Court in *Gunn v Bord an Choláiste Náisiúinta Ealaíne is Deartha*.[101] The plaintiff was a part-time teacher at the defendant college, who was accused of defrauding his employer and taking bribes from a contractor engaged by the college. He was suspended pending an investigation, with which he failed to co-operate; as a result, he was dismissed. McCarthy J held:

> [I]n the absence of any particular prescribed procedure, the principles of natural justice or constitutional justice … govern the relationship between the plaintiff and [his employer]. These principles are not the monopoly of any particular class.[102]

Mooney v An Post[103] concerned a plaintiff dismissed for misconduct which involved mishandling of letters for delivery. Barrington J in the Supreme Court acknowledged:

> Dismissal from one's employment for alleged misconduct with possible loss of pension rights and damage to one's good name, may, in modern society, be disastrous for any citizen. These are circumstances in which any citizen, however humble, may be entitled to the protection of Natural and Constitutional justice…[104]

> Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal… [T]he minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.[105]

That is not to say there have never been doubts as to the applicability of fair procedures in private employment contracts.[106] It is worth observing that although the employers in *Gunn* and *Mooney* were at least quasi-public bodies (an art college and national postal service

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of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.'

[101] [1990] 2 IR 168.

[102] *Gunn v Bord an Choláiste Náisiúinta Ealaíne is Deartha* [1990] 2 IR 168, 183.

[103] [1998] 4 IR 288 (SC).

[104] *Mooney v An Post* [1998] 4 IR 288 (SC), 298.

[105] *Mooney v An Post* [1998] 4 IR 288 (SC), 298. See also *Tierney v An Post* [1999] IESC 66.

[106] In *Mooney v An Post* [1994] ELR 103 (HC), 116, Keane J had been of the view that 'it might be going too far… to incorporate into every contract of employment the principles of natural justice'. See also *Barry v Medical Defence Union* [2004] IEHC 62.

respectively), albeit acting in a private capacity, the employer in *Glover* was certainly a private company. The comments of Clarke J (as he then was) in *Rowland v An Post*[107] are worth reproducing *in extenso*:

> Lest this judgment might be misinterpreted as determining that the rules of constitutional justice necessarily apply in all [contractual disputes] it is important to emphasise that the formal application of those rules, as a matter of law, arises in the context of public law disputes where decisions or determinations which may, as a matter of law, have an adverse effect on the rights or obligations of an individual must be determined by a process which complies with those rules.
>
> It is also the case that certain private law disputes may give rise to a requirement to apply the rules of constitutional justice because such rules may, either by express inclusion or by implication, be taken to apply to a process arising under a contract whether that be, for example, a contract of employment, the contract which exists between the members of an organisation or, as here, a long term contract providing for a process which may lead to its determination for cause. As noted, some contracts, particularly employment agreements negotiated between employers and the representatives of employees, may make express provision that the rules of constitutional justice are to apply in certain processes… The extent to which it may be appropriate to imply a requirement to comply with the rules of constitutional justice into any contractual regime which does not make express provision for their inclusion is a matter to be considered on a case-by-case basis.[108]

Two things are important to note. First, there is no indication that this passage in *Rowland* has been relied on in subsequent decisions to weaken the protection of fair procedures in workplace disciplinary proceedings.[109] Those cases in which the courts have relied on *Rowland* in finding that a worker's right to fair procedures has not been breached have not called into question that the right does, in fact, apply; on the contrary, they presuppose that

[107] [2017] IESC 20.
[108] [2017] IESC 20, [3.1]-[3.2].
[109] Admittedly, given the recent provenance of *Rowland*, there is a necessarily small sample available.

it does.[110] Even after *Rowland*, the authors of *Kelly* state that 'the rules of natural justice apply to any dismissal from employment'.[111]

Second, Clarke J was directing his comments at the contention that *all private contracts* must contain a provision for fair procedures. Although he held this was not the case, that is not to say that there is not such a right within all *employment* contracts. There are good reasons to think that even if the right to fair procedures is only to be applied in private contractual arrangements on a case-by-case basis, workers facing disciplinary proceedings will invariably fall into the category to which the right does apply. In *McKelvey v Iarnród Éireann*, Clarke CJ reiterated:

> It is, of course, clear that a regime (whether contractual or statutory) that provides for a disciplinary process will contain an implied term (if there is no express term to the same effect) that the relevant process will be fair. However, it is also clear that precisely what is required to ensure that a process is fair in that sense will depend on a variety of factors and may well vary from case to case.[112]

In general, even where courts have been inclined to restrict the practical effect of fair procedures, they have upheld the principle that the constitutional right applies even in private employment cases.[113] As discussed above, the courts have already recognised that the employment relationship may well form a 'special category of private law relationships that are subject to the principles of natural and constitutional justice'.[114] Indeed, the very fact that the courts apply constitutional norms in the context of employment and *not* in other private contracts supports the underlying theme of this thesis that there is something

[110] See, for example, *McKelvey v Iarnród Éireann* [2018] IECA 346; *Kelly v Minister for Agriculture, Fisheries and Food* [2019] IECA 299. The Supreme Court in *Ruffley v the Board of Management of St Anne's School* [2017] IESC 33, decided after *Rowland* but which does not refer to it, also assumed that the right to fair procedures applied.
[111] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [6.1.128], fn 363.
[112] *McKelvey v Iarnród Éireann* [2019] IESC 79, [6.3] (Clarke CJ).
[113] For recent examples of the courts proceeding on the basis that fair procedures are constitutionally required of employers, without further discussion of the principle (but going on to caveat the practical requirements of fair procedures), see *Boyle v An Post* [2015] IEHC 589, [8]ff; *Bank of Ireland v Reilly* [2015] IEHC 241, [49]; *Kelly v Minister for Agriculture, Fisheries and Food* [2019] IECA 299, [45]; *McKelvey v Iarnród Éireann* [2018] IECA 346, [30], [48]-[49], [51]-[52].
[114] Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [6.1.128].

constitutionally-significant about the employment relationship, that justifies horizontality.[115]

(b) Waiver

The means by which the courts tend to vindicate the right to fair procedures is by means of an implied term. There are examples in Irish law of similar protection being found in the implied term of mutual trust and confidence, which is of private law origin,[116] but this chapter is concerned with the existence of a *constitutionally*-implied term providing for fair procedures. Ryan calls this 'the constitutionally-inspired term of fairness', which Irish courts 'are willing to graft… onto terms already in an employee's contract of employment'.[117]

There is an obvious problem that arises with the implied term approach, one which is hinted at in *Glover*,[118] and explicitly acknowledged in *Gunn*: '*in the absence of any particular prescribed procedure*, the principles of natural justice or constitutional justice would govern the relationship between the plaintiff and [his employer]'.[119] That is to say, the implied term protecting the right to fair procedures is presumed to be present in a contract of employment, *absent express provision* for some alternative process (which may or may not encompass the sort of protections the right to fair procedures provides). In effect, this would mean the parties could contract out of fair procedures. The question of whether it is

[115] A question has arisen, in Ireland no less than other jurisdictions, as to whether a guarantee of fair procedures arises only where there is another, substantive, right at stake in the decision. For reasons of space, it has been decided not to address that issue here. For discussion, see Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming). There has also been some uncertainty whether the right to fair procedures applies to all reasons for dismissal: see Alan Eustace, 'If It Walks Like Misconduct and Quacks Like Misconduct… It's "Poor Performance"? *O'Donovan v Over-C Technology Ltd* [2021] IECA 37' (2021) 18(2) Irish Employment Law Journal 31; *cf Heffernan v Mater Private Hospital* [2021] IEHC 850.

[116] See the discussion in Desmond Ryan, *Redmond on Dismissal Law* (3rd edn, Bloomsbury 2017) [5.21]-[5.71] and Mary Redmond and Paula Murphy, 'Dismissal' in Ailbhe Murphy and Maeve Regan (eds), *Employment Law* (2nd edn, Bloomsbury 2017) ch 18, [18.23]-[18.34].

[117] Desmond Ryan, *Redmond on Dismissal Law* (3rd edn, Bloomsbury 2017) [8.17]. For a most recent example, see *Barrett v Commissioner for An Garda Siochana* [2022] IEHC 86, [110]: 'In this case, the plaintiff relief on his implied right to fair procedures, which appears to me to be an implied contractual right.' The constitutional relevance of this right was not discussed in *Barrett*.

[118] *Glover v BLN Ltd* [1973] 1 IR 388, 425: 'It is unnecessary to decide to what extent the contrary can be provided for by agreement between the parties.'

[119] *Gunn v Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 IR 168, 183.

permissible to contract out of fair procedures was deliberately left unanswered by Walsh J in *Glover*;[120] unfortunately, it does not appear to have been directly addressed since.

In *Mooney*, the Court stated: 'If the contract or the statute governing a person's employment contains [a] procedure whereby the employment may be terminated it *usually* will be sufficient for the employer to show that he has complied with this procedure.'[121] Regrettably, Barrington J did not elaborate under which circumstances it would *not* be sufficient. Often, the facts of the cases are such that there is *some* procedure provided for, which establishes some kind of board or committee to investigate the alleged misconduct or make a decision as to sanction. In such circumstances, that decision-maker is bound to follow fair procedures.[122]

This does not address the question of whether it would be possible for a contract to provide for a disciplinary process which expressly denies fair procedures in general terms, or in any specific respect. One example which has been extensively litigated is where a contract provides for specific persons who may accompany a worker to a hearing, but the worker claims fair procedures ought to allow him to bring some other representative, like a solicitor. This was the situation in *Stoskus v Goode Concrete Ltd*:[123] the plaintiff was subject to a disciplinary hearing at which he was, according to his contract, entitled to be accompanied by a work colleague (but no other person). The plaintiff argued that, notwithstanding the express terms of the contract, fair procedures required he be legally-represented, because he (and several other employees) had been engaged in litigation against his employer on a different matter at the same time, and because English was not his first language. It was accepted that the procedure in question was compliant with the relevant (non-binding) Code of Practice on Grievance and Disciplinary Procedures, devised by the then-Labour Relations Commission,[124] which does not require legal representation.[125] Irvine J distinguished the case from those in which the subject of

[120] *Glover v BLN Ltd* [1973] 1 IR 388, 425.
[121] *Mooney v An Post* [1998] 4 IR 288 (SC), 298 (emphasis added).
[122] [1998] 4 IR 288, 298: 'If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent Board or Arbitrator before he can be dismissed then clearly that independent Board or Arbitrator must conduct the relevant proceedings with due respect to the principles of Natural and Constitutional justice.' See also *Flynn v Great Northern Railway Company* (1955) 89 ILTR 46.
[123] [2007] IEHC 432.
[124] Now the Workplace Relations Commission.
[125] Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (SI no 146/2000).

disciplinary proceedings had not signed up to a specified process in advance.[126] As a result, she appears to cast doubt on the extent to which the right to fair procedures could override express contractual terms: '*Prima facie* his rights in relation to the conduct of a disciplinary hearing should be a matter of private law and defined by the contract between the parties.'[127] She said:

> [T]he plaintiff will effectively have to prove that *every* employee threatened with potential dismissal has a right to legal representation at his disciplinary hearing, irrespective of any contractual provision which provides for lesser representation such as representation through a colleague or trades union representative. On the plaintiff's submission, *no* company could oblige its employee to sign up to a contract of employment… provid[ing] for *anything other than* full legal representation in the event of disciplinary proceedings …[128]

With all due respect, this is not the appropriate question. It is clear from the jurisprudence recounted above that the practical requirements of the right to fair procedures in disciplinary proceedings will vary case-by-case. As such, the plaintiff need only to have established first, that constitutional rights may *in principle* override express contractual terms; and second, that fair procedures require that he be afforded legal representation, notwithstanding the terms of his contract, in the present circumstances. By no means should he have been required to demonstrate that fair procedures always require legal representation, contrary to the terms of all contracts which provide otherwise.

This may be contrasted with the approach of Eagar J in *Lyons v Longford Westmeath Education and Training Board*.[129] The applicant was subject to disciplinary proceedings after allegations were made that he had bullied a colleague. Given the seriousness of the allegations, the applicant demanded legal representation. However, the employer insisted on carrying out the proceedings in accordance with its anti-bullying policy, which prescribed a disciplinary process that allowed workers to be accompanied by a colleague or trade union representative, but not legal advisors. Despite the policy explicitly

[126] *Flanagan v UCD* [1988] IR 724; *Gallagher v the Revenue Commissioners (no 2)* [1995] 1 IR 55.
[127] [2007] IEHC 432.
[128] [2007] IEHC 432 (emphasis added).
[129] [2017] IEHC 272.

precluding legal representation, Eagar J held the applicant's right to fair procedures meant he was entitled to be legally-represented at the investigation meetings provided for in the policy.[130] In the absence of legal representation, the disciplinary proceedings could not progress any further.[131]

It is true that Eagar J's decision in *Lyons* was strongly criticised by the Court of Appeal in *McKelvey v Iarnród Éireann*,[132] on very similar facts, as 'depart[ing] to a significant extent from the jurisprudence'.[133] However, the criticism levied by the Court of Appeal is really in respect of whether the right to fair procedures does in fact require legal representation during disciplinary proceedings (the narrower question also at the heart of *Stoskus*), rather than the question of principle as to whether the right to fair procedures can override express contractual provisions. This point did not arise in *McKelvey*, because under the contractual procedure,[134] the employer had discretion to allow legal representation,[135] and because of the Court's determination that fair procedures did not require the plaintiff to be legally-represented.[136] Even if *Lyons* was incorrect on the substantive question of whether fair procedures require legal representation, there remains reason to think it was correct on the question of principle. Recall in *Mooney*, the Court said:

> Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal… [T]he minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.[137]

[130] [2017] IEHC 272, [95]: 'It is quite clear to this Court that the proceedings adopted by Graphite Recruitment HRM Ltd. is in breach of Article 40(3)(1) and (2) of the Constitution of Ireland by the refusal to allow legal representatives to appear on behalf of the applicant.'
[131] [2017] IEHC 272, [103]: 'the Chief Executive is relying on a flawed and constitutionally impermissible finding of bullying'; [105]: 'The Chief Executive has no constitutionally sound basis to hold a disciplinary hearing'.
[132] [2018] IECA 346.
[133] [2018] IECA 346, [48].
[134] Here, the procedures relied on definitely formed part of the contract of employment; [2018] IECA 346, [9].
[135] [2018] IECA 346, [27], [52].
[136] [2018] IECA 346, [35]ff, [52], [58]-[61], [84]-85].
[137] *Mooney v An Post* [1998] 4 IR 288 (SC), 298.

This echoes the idea of an 'irreducible minimum' posited by the ECtHR in *Bărbulescu v Romania*,[138] in which the Court held that even where his employer had notified the applicant that his private communications would be subject to monitoring, 'an employer's instructions cannot reduce private social life in the workplace to zero'.[139] It may be the case that employers cannot *entirely* exclude fair procedures by express contractual term, even if the minimum that must be provided is far short of the right to legal representation actually applied by Eagar J in *Lyons*.

However, outside of *Lyons*, there is scant evidence of courts overriding express terms to protect the right to fair procedures.[140] In *McKelvey v Iarnród Éireann*, the Court of Appeal gave a (non-exhaustive) list of the undisputed requirements of fair procedures in disciplinary proceedings:

(i) [the worker's] right to know the nature of the complaint/allegation made against him;
(ii) his right to know the procedure to be followed in the course of the investigation;
(iii) his right to know the potential implications of the complaint/allegation should it be established, *ie*, the sanction/sanctions that might be imposed;
(iv) his right to be heard in relation to the complaint/allegation and to make representations in relation thereto;
(v) his right to challenge such evidence as might be called to establish the complaint/allegation and to cross-examine all witnesses;
(vi) his right to call witnesses in support of his stated position.[141]

This passage suggests that these requirements, at least, must override conflicting contractual provisions. The Supreme Court judgments in *McKelvey* focused more on the

[138] Application no 61496/08.
[139] Application no 61496/08, [80].
[140] A possible exception is *Flanagan v UCD* [1988] IR 724, where a student accused of plagiarism was held to be entitled to legal representation at a hearing notwithstanding university regulations to the contrary. Although Irvine J in *Stoskus* considered *Flanagan* an example of a case where the plaintiff had *not* signed up to a particular procedure, it could be argued that by choosing to enrol at that university, the plaintiff could be considered in an analogous position to a worker who signs a contract of employment. Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [15-76] portray *Flanagan* in this light, and consider that *Burns v Governor of Castlerea Prison* [2009] IESC 33 and *McKelvey v Iarnród Éireann* [2018] IECA 346 are departures from *Flanagan*.
[141] [2018] IECA 346, [51]. For a recent example of these practical implications, see *O'Sullivan v Health Service Executive* [2022] IECA 74.

precise question of whether legal representation is required as a matter of fair procedures in disciplinary proceedings, without ruling definitively on what, in general, was required.

In the leading decision, Clarke CJ held (in keeping with his earlier decision in *Rowland*): '[A] regime (whether contractual or statutory) that provides for a disciplinary process will contain an implied term (if there is no express term to the same effect) that the relevant process will be fair.'[142] The learned Chief Justice expressly declined to decide the question of whether, if there is an express term *precluding* fair procedures (either in general, or in any particular respect, such as representation), the constitutional right will override the contract.[143]

On the other hand, Charleton J (concurring) observed that ordinarily, the employer will have complied with the statutory obligation under the Unfair Dismissals Act 1977[144] to have in place a disciplinary policy, which will be an express term of the contract. Again, ordinarily, this policy will be compliant with the non-binding statutory code of practice in this area.[145] However, where an employer is in default, he stated:

> Issues may arise where standard procedures are not those sensibly derived from the [non-binding statutory code] but are, instead, incorporated into a contract of employment… But such examples propose that there are minimum standards which, despite anything written in the contract, cannot be infringed. As much is said by Barrington J in the *Mooney* case…[146]

As such, it appears that workers' constitutional rights cannot be entirely waived by contract. The situation should be compared with the position in *Meskell v Córas Iompair Éireann*:

> If the employer dismisses the worker because of the latter's insistence upon exercising his constitutional right, the fact that the form or notice of dismissal is good at common law does not in any way lessen the infringement of the right

[142] [2019] IESC 79, [6.3] (Clarke CJ).
[143] [2019] IESC 79, [6.1] (Clarke CJ).
[144] Section 14(1).
[145] Industrial Relations Act 1990 Code of Practice on Grievance and Disciplinary Procedures (Declaration) Order 2000 (SI no 146 of 2000).
[146] [2019] IESC 79, [13]-[14] (Charleton J).

> involved or mitigate the damage which the worker may suffer by reason of his insistence upon exercising his constitutional right. If the Oireachtas cannot validly seek to compel a person to forgo a constitutional right, can such a power be effectively exercised by some lesser body or by an individual employer? To exercise what may be loosely called a common-law right of dismissal as a method of compelling a person to abandon a constitutional right, or as a penalty for his not doing so, must necessarily be regarded as an abuse of the common-law right because it is an infringement, and an abuse, of the Constitution which is superior to the common law and which must prevail if there is a conflict between the two. The same considerations apply to cases where a person is dismissed or penalised because of his insistence upon, or his refusal to waive, his right…[147]

Strictly speaking, the employer in *Meskell* was not relying on breach of a contractual term waiving a right to effect the dismissal: it was dismissing workers in accordance with an existing contract, in order to induce them to sign a new contract containing a waiver clause. Walsh J declined to answer the question of whether a 'pre-entry' waiver could be valid,[148] but it seems entirely consistent with the firm statement of principle above that later dismissal on foot of a waiver clause would be treated similarly sceptically. There are cases that support the waiver of constitutional rights in some circumstances,[149] but only 'on the basis of full knowledge and consent'. Consent sufficient to waive a constitutional right seems to be higher than the ordinary consent required to engage contractual obligations, and might be vitiated in many employment cases: in *G v An Bord Uchtála*, Walsh J said that 'a consent motivated by fear, stress, anxiety, *or… dictated by poverty* or other deprivations cannot constitute a valid consent'[150] for a waiver of constitutional rights. Of

[147] [1973] 1 IR 121, 135.
[148] [1973] 1 IR 121, 136. Likewise in *Becton, Dickinson & Co Ltd v Lee* [1973] IR 1, 40-41 Walsh J declined to address 'the question of how far, or in what circumstances, a person can contract out of a constitutional right; or to what extent such an agreement would be enforced.' There, he treated the term of the contract imposing a closed shop as if it were valid, but held that a strike by members of a minority union to have that clause removed from their contracts was protected by statute. As mentioned above, Henchy J (dissenting) held at 48 that such a waiver of the right to disassociate was valid once it was imposed pre-entry. Walsh J did seem to accept *obiter* that a worker could waive by contract his right to strike, but the courts would be very slow to find this had occurred, and would be conditional on the existence of some other mechanism for settling disputes (see 38).
[149] See for discussion, Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.1.99]ff; in the particular context of fair procedures, see Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [14-94]ff, [15-11]ff.
[150] [1980] IR 32, 71 (emphasis added).

course, in *McF v G*, McWilliams J held 'these considerations [of poverty *etc*] must be considered from a practical point of view'.[151] As we saw in Chapter 3, capitalist labour markets *depend* on workers having insufficient material means to survive without selling their labour. Material realities should make us suspicious of waiver, but it is impractical to inquire into a worker's relative wealth in order to determine if a waiver is valid. Therefore, and for the reasons explored in Chapter 5, a sustainable theory of constitutional labour law must include the prospect of rights at least sometimes overriding contractual terms expressly providing for waiver, even in circumstances where the worker *did* freely consent at the time. Irish doctrine shows a latent preference for consent to be given at the time a right falls to be exercised, rather than some time in advance when the consequences of waiver are unclear.[152] Applying this to the topic at hand, a worker remains free to waive his right to fair procedures (generally, or a particular aspect thereof) in disciplinary proceedings *during those proceedings*, but not in advance by contract. This would, for example, preclude the worker from challenging a disciplinary process where he had the option to make submissions but declined, while still allowing him to challenge a process in which he was prohibited from making submissions under the contract of employment, even if valid consent was given.

However, that is not to say that a contractual relationship is incapable of affecting the nature and scope of rights. The realities of the workplace necessitate, not abrogation, but certainly modification of some rights, as compared to how they operate against the state. The next sub-section will move on to looking at such adaptations.

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[151] [1983] ILRM 228, 232-33. In that case, concerning (like *G*) parental consent to adoption, he pointed out that almost every adoption of this kind is motivated at least in part by fear of social stigma or the anxiety of raising a child in conditions of poverty; if the parent(s) were wealthy and not afraid, stressed or anxious, they would be inherently less likely to put the child up for adoption. *Mutatis mutandis*, if a prospective employee was wealthy enough to forego employment rather than consent to a waiver of his rights, he would be less likely to seek employment at all. Likewise Flood J in *AC v St Patrick's Guild Adoption Society* (HC, 31 July 1995), 11 said: 'In the course of each individual's life, decisions are made in which existing personal circumstances and opportunities are reflected. There is virtually no individual who would not acknowledge, in relation to some major decision, that if ideal circumstances or indeed specifically different circumstances existed their decision would be different. This actual decision is not to be considered as non-voluntary or lacking in assent or otherwise [vitiated] by the absence of an ideal scenario. We live in a real world where choices have to be made. If that choice is predicated by the non-existence of desired circumstances and is made in the light of such non-existence or some non-existent circumstance, the choices and consequences that flow cannot be annulled or declared void simply because on mature reflection, at some time post the date of decision, when we are pregnant with the wisdom of hindsight we recognise the error of our decision and want to change it.'

[152] See, for example, *G v An Bord Uchtála* [1980] IR 32, 80. See also the discussion in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [7.7.230]-[7.7.232] and cases cited therein.

(c) Adaptations of rights

There is no space to consider all of the necessary incidents of the right to fair procedures set out in the passage from *McKelvey* above. This section will focus on two particular concessions the courts have made in the application of fair procedures to disciplinary proceedings in private employment: the relaxation of the rule against bias, and a reluctance to allow legal representation for workers. This will bring us back to the relationship between representation and participation – that is, one founded on effectiveness and efficiency – and in turn back to the importance of participation for a citizenship-based theory of constitutional labour law.

First, bias. Barrington J stated in *Mooney*:

> [T]wo of the best known precepts of Natural and Constitutional justice may not be applicable at all in certain [employment] cases. …[T]he principle of *nemo judex in sua causa* [*sic*] seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the principle of *audi alteram partem* which implies the existence of an independent Judge who listens first to one side and then to the other…[153]

This slightly overstates the position – it is not that *nemo iudex* and *audi alteram* do not apply 'at all' in employment cases, but rather that their prescriptions are relaxed to take account of the realities of the workplace and the employment relationship. Keane J, in the High Court in *Mooney*, had put it as follows:

> …the *nemo iudex* requirement cannot be literally applied to every employer confronted with a decision as to whether or not he should dismiss a particular employee. If it were, an employer could never dismiss an employee, since he would always be an interested party in the decision. Where, however, natural justice requires a hearing by an impartial tribunal before an employee is dismissed, the

[153] *Mooney v An Post* [1998] 4 IR 288 (SC), 298.

> presence on the tribunal of someone who has hitherto been in a prosecuting role may be a violation of the principle.[154]

In other words, an employer must be entitled to decide whether or not to dismiss a worker, even though he has an interest (indeed, a financial interest, which would normally give rise to a patent violation of *nemo iudex*)[155] in the decision.

In *Kelleher v An Post*,[156] Peart J identified another problem with applying *nemo iudex* to employment disputes – that all the people involved in the matter must continue to work together on a day-to-day basis while the process is ongoing:

> [T]he *nemo judex* [*sic*] rule cannot apply in all its glory to all situations in the area of employment law. It is inevitable that often during an internal or in-house investigation leading to a dismissal the decision-maker and some or all of the investigators will have some form of contact, and that there may be communication of some kind about the issues involved.[157]

The most recent decision on the subject of bias in employment disciplinary proceedings is that of the Supreme Court in *Kelly v Minister for Agriculture*.[158] Here, a harbour master was accused of using his position for private financial gain, and other mismanagement of the harbour. Some allegations had been made by a Government Minister (who was also the local TD)[159] to the civil servant carrying out the internal investigation into the harbour master's conduct. Later, the recommendation to dismiss the harbour master was accepted by the Government in a Cabinet meeting; the plaintiff alleged bias in that the Minister in

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[154] *Mooney v An Post* [1994] ELR 103 (HC), 116.
[155] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [14-05], [14-16]ff. In *Boyle v An Post* [2015] IEHC 589, [17] Barrett J explained: [T]he very act of one employee dismissing another employee on behalf of their common employer is intrinsically 'supporting or helping either side in a conflict, disagreement' and is certainly not 'impartial' – why else would the dismissing employee execute the dismissal other than as part of a continuing duty *qua* paid employee to 'support or help' her or his employer? The only party who could approach being 'neutral' would be a third party 'outsider', and it has never been a part of our law, nor is it now, that an employer must, should, needs to, or would be well-advised to, invoke the assistance of such an 'outsider' to effect a lawful dismissal. Indeed, given that such third party would presumably be remunerated for her or his services by the relevant employer, even s/he could not properly be described as 'neutral'.
[156] [2013] IEHC 328.
[157] [2013] IEHC 328, [48]. See also *NM v Limerick Clare ETB* [2017] IEHC 588, [129].
[158] *Kelly v Minister for Agriculture, Fisheries and Food* [2021] IESC 23; [2021] IESC 62.
[159] Teachta Dála (Member of Parliament).

question had been involved in the Cabinet decision despite her earlier criticisms of the harbour master.[160]

The Court held the Minister who had made the complaints should have recused herself from the Cabinet meeting that confirmed the dismissal.[161] On its face, this would appear to apply to someone in an equivalent position in a private enterprise, such as the CEO not being the final decision-maker where he or she has made allegations against the employee. However, in his concurring judgment, O'Donnell J (as he then was) strove to confine this case to its exceptional facts, limiting its precedential value.[162] It is also likely that this case is an example of a higher standard of procedural rigour applying to a public administrative decision than would be the case for a private enterprise – or at least for the large majority of enterprises in which it is not possible for senior decision-makers to recuse themselves from dismissal decisions made by a collective body. As such, it seems to implicitly confirm that a very high bar is set for bias to be found in a private employment context.

Hogan *et al* consider employment situations to be an example of the 'necessity' exception to *nemo iudex*.[163] Whatever the necessary adaptations, however, the courts will not accept bias on the part of a decision-maker in a disciplinary procedure that arises from, for example, personal animus or pre-judgment;[164] this includes the same persons being involved in advancing or investigating complaints, and making decisions as to whether

[160] A second allegation of bias was also made, that the investigator was under pressure from the Minister. This was rejected by the Court: *Kelly v Minister for Agriculture, Fisheries and Food* [2021] IESC 23, [101], [116] (Dunne J). For his part, MacMenamin J (concurring) found both the final decision and the initial process to be tainted with bias.

[161] [2021] IESC 23, [122]-[128] (Dunne J).

[162] [2021] IESC 23, [14]-[20] (O'Donnell J). This point was also subject to a strident dissent from Charleton J, in which he argued that the constitutional requirements of Cabinet confidentiality and collective responsibility to the Oireachtas precluded judicial examination of the Minister's role in the decision (see [28]ff).

[163] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [14-90]ff. This is ultimately grounded in the fact that Article 40.3 of the Constitution, in which the right to fair procedures is found, is qualified by the phrases 'as far as practicable' and 'as best it may': see [14-92].

[164] The courts will not go so far as requiring actual bias (in the sense used by the Supreme Court in *Orange Communications Ltd v Director of Telecommunications Regulation (no 2)* [2000] IESC 22); some cases of perceived bias, particularly those based on personal *animus*, have been accepted as breaching fair procedures, including *Cassidy v Shannon Castle Banquets & Heritage Ltd* [1999] IEHC 245. Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [14-52]ff draw an interesting taxonomy of 'prior involvement' cases, the most important distinction of which for present purposes is that between where a person is involved in making the original decision and an appellate decision, and one where a person is involved in determining if a *prima facie* case is made out, and making the decision. The former amounts to bias much more easily than the latter.

those complaints justify a sanction.[165] So the *nemo iudex* principle clearly still has some force in employment discipline.

Turning now to representation. This brings us back to the relevance for our theory of effective participation in workplace decisions, including by trade union representation. In most cases, workers claim the purported right to be represented by a legal professional. The Irish courts have established a broad right to legal representation in administrative law;[166] however, they have been reticent to require employers to allow workers to be legally represented in disciplinary proceedings. An outlier in this regard is *Lyons*, wherein Eagar J states that the right to fair procedures requires a worker be represented throughout a disciplinary process.[167]

Criticising *Lyons* in this respect, the Court of Appeal in *McKelvey* stated: 'As is observed in many of the authorities, once lawyers become involved, the process is ultimately slowed, becomes more expensive and oftentimes will fracture and irreparably damage relations between employer and employee.'[168] The Court adopted the standard set out in *Burns v Governor of Castlerea Prison*[169] as appropriate to determine when the right to fair procedures will require that a worker be legally represented in disciplinary proceedings:

(i) the seriousness of the charge and of the potential penalty;
(ii) whether any points of law are likely to arise;
(iii) the capacity of a particular [worker] to present his own case;

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[165] See, among others, *Heneghan v Western Regional Fisheries Board* [1986] ILRM 225; *Mooney v An Post* [1994] ELR 103 (HC); *Cassidy v Shannon Castle Banquets & Heritage Ltd* [1999] IEHC 245; *NM v Limerick Clare ETB* [2017] IEHC 588, [130]-[131]. In *Boyle v An Post* [2015] IEHC 589, [17], Barrett J stressed that: '[C]ompany employees and officers required to investigate other company workers and make decisions regarding dismissal, or to determine appeals therefrom, should bring an appropriate level of objective detachment to the task required of them and not simply accede to the perceived expectations of an employer-company.' It is worth bearing in the mind the discussion in Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [14-06]-[14-07] to the effect that in large organisations, where only some members are biased, it may be necessary to consider whether that bias can be imputed to the organisation as a whole.

[166] See cases such as the seminal *Re Haughey* [1971] IR 217; *Kiely v Minister for Social Welfare* [1977] IESC 2; and *Borges v Fitness to Practise Committee* [2004] IESC 9.

[167] [2017] IEHC 272, [98]: 'It is noted by the Court that [a process with no provision for legal representation] is the process adopted by many companies when dealing with complaints against employees. It is quite clear that the exclusion of solicitors and counsel, and the refusal to allow cross-examination under such policies is a breach of the Constitutional right to fair procedures.'

[168] [2018] IECA 346, [85].

[169] [2009] IESC 33; these factors were in turn adopted from *R v Home Secretary, ex p Tarrant* [1985] 1 QB 251.

(iv) procedural difficulty;

(v) the need for reasonable speed in making the adjudication, that being an important consideration; and

(vi) the need for fairness as between [workers and management].[170]

This was expressly upheld by the Supreme Court on appeal as the appropriate test.[171] The Court also agreed with the general undesirability of legal professionals becoming involved in internal disciplinary proceedings, particularly at an early stage.[172] As such, there is only an entitlement to a lawyer where it is 'truly necessary' for the procedure to be fair, as opposed to simply giving some 'added value' for the employee.[173] What is useful for present purposes is that the courts have generally declined to require legal representation on the basis that the worker in question is entitled to representation by a trade union official.[174]

This position is supported by what is now the leading authority, *McKelvey*, in both the Court of Appeal and the Supreme Court. Both courts in that case accepted that although in general, it is undesirable for lawyers to be involved in disciplinary proceedings,[175] legal representation may be required in exceptional circumstances in order to vindicate the right to fair procedures.[176] What matters in deciding whether legal representation is required is not really the seriousness of the charge nor of the consequences for the worker,[177] but specifically (a) whether complex points of law will arise for determination;[178] and (b) the worker's capacity to participate in the procedure absent a lawyer.[179] Since (a) is unlikely to arise in most employment cases, the crucial matter for determining the scope of the right to fair procedures is a worker's capacity to participate. In *McKelvey*, it was held the presence

[170][2009] IESC 33, [14], cited in *McKelvey v Iarnród Éireann* [2018] IECA 346, [38]. This also mirrors the approach in *Stoskus v Goode Concrete Ltd* [2007] IEHC 432, where the Court paid particular attention to the question of whether the plaintiff's English language skills were sufficient for him to be able to present his own case at a hearing.
[171] [2019] IESC 79, [6.1] (Clarke CJ).
[172] See, for example, [2019] IESC 79, [13]-[14] (Charleton J).
[173] [2019] IESC 79, [6.6]-[6.8] (Clarke CJ).
[174] See, for example, *Stoskus v Goode Concrete Ltd* [2007] IEHC 432; *O'Neill v Iarnród Éireann* [1991] ILRM 129.
[175] [2018] IECA 346, [35]-[36].
[176] [2019] IESC 79, [6.1]-[6.4] (Clarke CJ).
[177] Although these are relevant, in accordance with the principles set out in *Burns*: see *McKelvey v Iarnród Éireann* [2018] IECA 346, [54]-[64].
[178] [2018] IECA 346, [73]; [2019] IESC 79, [6.7] (Clarke CJ).
[179] [2018] IECA 346, [82]-[83].

of an experienced trade union official as his representative meant the plaintiff was perfectly able to participate absent his lawyer.[180] It was particularly relevant that the trade union had been involved in drawing up the employer's disciplinary code and that the official in question was very experienced in representing employees at that workplace.[181]

McKelvey is therefore recognition that, ordinarily, workers can only meaningfully participate in decision-making processes in the workplace (particularly where there is an air of confrontation between the worker and management, with the associated imbalances of power and resources) with the benefit of representation by some independent and experienced advocate for their interests.[182] Ideally, this will be a trade union official.[183] Even in an exceptional case where the Court held workers were entitled to a lawyer but *not* a trade union official,[184] it implicitly confirmed the interpretation of *McKelvey* offered

[180] [2018] IECA 346, [83]-[85]. In the Supreme Court, Clarke CJ held: 'When considering whether any process is fair, in the context of representation, the question is not whether a particular type of representation might give some added value but whether its absence can be said to leave the person concerned without an adequate level of representation': see *McKelvey v Iarnród Éireann* [2019] IESC 79, [6.7] (Clarke CJ). He ultimately determined: 'I am not satisfied that there is anything in the evidence in this case which would satisfy a court that representation by an experienced trade union official would not be adequate to secure a fair process' and that should the representative made available by the plaintiff's trade union prove inadequate, he could be replaced with a different trade union representative: see [7.6]-[7.8].

[181] [2018] IECA 346, [84].

[182] *Burns v Governor of Castlerea Prison* [2009] IESC 33, [5] also refers to 'advocacy assistance' as a necessary component of fair procedures.

[183] Of course, some workers will prefer to represent themselves (or bring a friend), perhaps because they think they will present their case more effectively than a union rep or lawyer could. Obviously, a significant majority of workers in most countries are not union members – though it is impossible to say what effect on membership an approach to constitutional labour law advocated in this thesis would have. Anyway, this thesis is not advocating that representation be mandatory (particularly in light of the conclusions reached in respect of closed shops above), so workers who genuinely believe their interests are better served representing themselves are free to do so. More common will be the case that a worker would like representation, but cannot afford to retain a lawyer, or even to join a union. It is clear from the thesis so far that the state has an interest in facilitating and promoting union membership; whether this extends to subsidising the cost of membership is beyond the scope of this thesis. For some discussion, see Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021).

[184] The exceptional case is *McGrath and Ó Ruairc v Maynooth College* [1979] ILRM 166. Here, the plaintiffs were allowed have their lawyers present for a disciplinary hearing, but forbidden from bringing a trade union representative (see 178). The remainder of the case law has proceeded from the assumption that lawyers provide more effective representation from the perspective of the worker, so the question in cases like *McKelvey* is whether a trade union official provides effective *enough* representation to satisfy the right to fair procedures. In light of the concerns recognised in the case law that lawyers make internal proceedings too inefficient, quite why the employers in *McGrath* were willing to allow lawyers but not trade unions is not immediately obvious. Although not expressly stated in the judgment, the likely reasoning is as follows: the plaintiffs were lecturers in the defendant university, which at that time operated as a seminary for the training of Catholic priests, and the trustees for the university who made the decision to dismiss the plaintiffs were bishops. The plaintiffs themselves had been appointed to teach in their capacity as priests, but subsequently applied for laicisation. The trustee bishops probably did not accept the relationship as one of employment, but of ministry, and as such did not consider a trade union to be appropriate representatives for the plaintiffs. The Supreme Court held there was no breach of the right to fair procedures, tacitly upholding the presumption that lawyers are considered more effective representatives than trade union officials (see 184). On the same

above, that the right to fair procedures requires that workers be entitled to representation by either a trade union official or a lawyer, and that what matters is effectiveness of participation in the decision-making process. It would be highly incongruous if the courts accepted, as a general rule, that employers were free to prohibit their workers from engaging union representation and obliged them to engage legal representation, given the cost implications for workers. This would make the prospect of meaningful participation highly remote for most workers.

Summary

We can see underlying the case law in this area two guiding principles,[185] which serve both to justify procedural protections for workers and circumcise their scope: the effectiveness of worker participation on one hand, to be balanced against the need for efficiency of decision-making on the other. Even private sector workers are entitled to participate in decision-making that affects their own interests, particularly where they are at risk of dismissal. The courts have thereby recognised a role for constitutional norms in the labour relationship. However, this participation is less than they might be entitled to in respect of a public administrative body, and is adapted to reflect the realities of the workplace. There are nonetheless minimum requirements which appear capable of overriding contractual provisions to the contrary, even where these are freely agreed between the parties. The right to fair procedures is thus, to a certain extent, 'non-convertible' in the sense discussed in Chapter 5.

This is highly desirable, both from the perspective of the theory advanced in this thesis, and in light of other normative justifications for fair procedures.[186] Fair procedures not only

page, O'Higgins CJ stated specifically: 'Having been afforded an opportunity to be present and to be represented, in my view, they were not entitled to insist on a special form of representation.'

[185] Regrettably, the law is not always a model of clarity in how these principles are manifested. As pointed out by Charleton J in *Kelly v Minister for Agriculture, Fisheries and Food* [2021] IESC 23, [1] (Charleton J): 'Where the law on fair procedures has become so complex as to command days of analysis, then the law is undermined'.[185] The very complexity of the law on fair procedures may render procedures unfair. Although recent cases like *Rowland* and *McKelvey* have provided welcome clarification on various aspects of fair procedures, Baker J's *dictum* in *Chawke v Mahon* [2014] IEHC 398, [28] – 'there are no rules for determining […] when natural justice or the right to fair procedure[s] applies, and how the requirement is best met' – is only a slight exaggeration of the state of the law. See further Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).

[186] See Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).

help employers (like other decision-makers) to make more accurate decisions, but are crucial to the legitimacy of employer authority. They are an important means by which employers help protect workers' capacity to function as citizens, thereby providing support to democratic culture. It is not just that citizens have come to expect this kind of process because of their experiences with *public* officials (who are held to high procedural standards), but that a participatory process at work allows workers to develop their citizenship skills and the 'habits of democracy', to contest decisions that affect them in all areas of life.

One task remains for this chapter. The premise for analysing Irish doctrine on collective representation and fair procedures in disciplinary proceedings together was that these are twin aspects of the value of participation, as it applies within the enterprise (with the third aspect of participation, subsidiary regulatory institutions outside the enterprise, still to come in Chapter 8). Now that we have seen how the practical issues work out in doctrine, we are in a position to revisit that foundation. The final section of this chapter will assess the complementarity of collective and individual participation, and argue the Irish courts are wrong to treat these so divergently.

Collective action and fair procedures: two aspects of enterprise participation

The previous chapter developed a theoretical account of participation and representation of workers in decisions about production (that is, the management of the business and various associated decisions that must be made in the course of productive activity). It demonstrated the place of that account within an overarching theory of constitutional labour law centred on citizenship, developed in the previous Part. Therefore we can see the proper place of participation and representation within constitutional labour law. It has been proposed in this Part that there are three aspects to the value participation in constitutional labour law: collective action of workers (particularly through trade unions); individual treatment in disciplinary proceedings (*ie*, fair procedures); and subsidiary regulatory institutions. The first two of these – dual aspects of participation and representation *within the enterprise* – have been examined in this chapter.

Our case study of Irish constitutional jurisprudence indicated that the courts treat collective action and fair procedures differently. Not only are they much more likely to afford

protection to the right to fair procedures, but the jurisprudence is much more sophisticated in its engagement with the issues of horizontality, waiver and adaptation (albeit still flawed in various respects, explored above). This thesis argues that the explanation for the difference lies in the fact that when it comes to fair procedures, the courts have recognised the value of participation we explored above (to a certain extent), whereas in the area of collective action and trade unions, the jurisprudence is normatively and conceptually hamstrung by its focus on 'freedom of association'. To recap some of the discussion above: if 'association' means 'the right to form and join', then it simply does not apply to employer recognition of trade unions.[187] Nobody is asking the employer to *join* the trade union – simply to recognise it as representative of workers. Alternatively, 'association' might be the much broader concept of 'deal with' – but in that case, the discrepancy between an obligation on employers to allow workers to be represented by unions in disciplinary proceedings but not contractual negotiations *etc* demands explanation.

In order to demonstrate that individual fair procedures and collective action should be treated as complementary manifestations of the value of participation in productive decision-making within an overarching theory of citizenship, and protected as such by courts through constitutional labour law, we should compare the two processes. It is worth examining two respects in which we might distinguish between them: (a) that these are different kinds of decision; and (b) efficiency considerations. The rest of this section will demonstrate that, while there are important distinctions, these are not as stark as first appear, and do not justify treatment so divergent as the Irish courts have given. That will indicate the ways in which courts *should* treat these issues as a matter of constitutional labour law.

(a) Different decisions

One argument is that disciplinary proceedings and negotiations over terms of employment are simply different kinds of decision. There are, of course, important differences, but they are more alike than they first appear. We must remember that the worker can always quit his job if the terms are not acceptable to him, and employers have wide discretion in

[187] Daryl D'Art, 'Freedom of Association and Statutory Union Recognition: A Constitutional Impossibility?' (2020) 63 Irish Jurist 82, 100.

whether to apply sanctions, and in what form. This means the initiation of disciplinary proceedings effectively triggers a reconsideration of the terms of employment by both sides.

On the part of the worker, where there are disciplinary proceedings at all, clearly the worker wants to remain in the job (because otherwise he would quit rather than go through the process). The terms of employment have to be 'worth it' for the worker to go through the disciplinary process in the hope of being retained.[188] On the part of the employer, the choice of sanction reflects whether the employer thinks it is 'worth' keeping the worker around, despite the trouble caused.[189] The employer may choose dismissal, or readjust the terms of employment (demotion or pay cut) to make retaining the worker worthwhile.[190] This is even true if his conduct is egregious (say, sexual harassment): the business will have to weigh up the risks of lawsuits from victims, public opprobrium tarnishing the brand, *etc* against the worker's economic value to the business. The 'cost' of whatever misconduct the worker committed to engage the disciplinary proceedings can hardly be separated from other costs (like wages and holidays), and must be weighed against the benefits that worker brings to the business. The worker's performance, of course, is assessed by reference to his terms of employment and what is expected of him. In this way, even dismissals for misconduct inevitably raise questions of performance too. Even if the dismissal is ultimately motivated by the employer's moral outrage over the wrongdoing, or genuine concern for victims,[191] 'performance' can be easily stretched to include more than income-generation, but contribution to workplace culture, staff satisfaction, *etc*.

If nothing else, we can clearly see that if a worker is to be assessed (for performance or misconduct) on the basis of a set of standards set out in terms of employment, and he has a

[188] This may be clearest when we consider that a possible outcome of a disciplinary hearing may be demotion (which changes the working conditions) and/or a pay cut: it is hard to see how a decision which can result in a reduction in one's pay is all that different from a decision over whether to increase one's pay. This is especially so when inflation might mean that a failure to increase pay amounts to a reduction in real terms; I am obliged to Chris McMahon for pressing me on this point.

[189] Of course, the employer is not entirely free to dismiss for minor infractions, despite his subjective judgment that the worker is not 'worth the hassle' – he will be constrained by the provisions of the Unfair Dismissals Act 1977.

[190] Alan Eustace, 'If It Walks Like Misconduct and Quacks Like Misconduct… It's "Poor Performance"? *O'Donovan v Over-C Technology Ltd* [2021] IECA 37' (2021) 18(2) Irish Employment Law Journal 31. See also Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).

[191] And there are reasons to doubt this will ever really be the case, at least in capitalist firms legally obliged to prioritise returns to shareholders above all else.

right to participate meaningfully and effectively (by means of representation if necessary) in that assessment, then he must also have a right to participate meaningfully and effectively in the drawing up of the terms by which he will be assessed. Moreover, he will typically be judged *comparatively* with other workers as representing appropriate standards of performance and conduct – which suggests workers *collectively* should be entitled to (help) determine the standards by which they will be judged *individually*.

Of course there are differences in *form* between deciding whether to employ someone on the basis of a set of terms of employment, and deciding whether to continue employing someone on those (or amended) terms, in light of some known cost arising from poor performance or misconduct. But in both cases, employers are weighing up costs (potential and realised) and benefits, in terms of the contribution (positive and negative) the worker makes to the productive activities of the business. This fundamental overlap is not determinative of how to realise the value of participation in each context: we saw above that the Irish courts have been relatively prescriptive in setting out minimum standards for the participation of workers in disciplinary decisions that concern them, but this thesis has deliberately declined to prescribe in detail what form of collective participation best protects the citizenship of workers. That means in practice, there may be differences in the level and form of involvement each individual worker can have, in circumstances where he himself faces dismissal, versus collective determination of working conditions. But it does suggest that there should be collective bargaining in respect of procedures for disciplinary proceedings, subject to the minimum requirements for fairness. It also suggests collective bargaining over the appropriate standards for conduct and performance – which are, of course, key terms of employment.

(b) Efficiency

An employer might explain the difference between participation in disciplinary decision-making and other productive decisions on the basis that trade union representation in the former process does not lead to much of an efficiency loss. This is at least partly because the disciplinary process is ‘one-to-one’. The efficiency concern is certainly a legitimate one: this is why, for example, Irish courts are reluctant to hold that the constitutional right to fair procedures requires representation by a lawyer. As discussed in the case law above, lawyers are perceived (even by a presumably sympathetic audience on the Bench) to have

an unfortunate professional habit of making things more complicated than necessary. However, those cases also show that workers are entitled to representation by a trade union in 'one-to-one' situations, raising the question of whether it is sustainable to draw a distinction between individual and collective representation.

It is clear from the Irish jurisprudence on fair procedures that participation in decision-making must be *effective*. Workers are entitled to be represented (including by trade union officials) if it is necessary for their participation to be effective and meaningful. This leads us to an important point that is easily overlooked when discussing recognition and collective bargaining. These issues are often conceived of as matters for the relationship between trade unions and employers. But the correct way to view the relationship is that *workers* have a claim to participation, including by *means* of representatives of their choice if that is necessary for their participation to be effective. This generates obligations on the part of employers to those workers to recognise the workers' chosen representatives. The representatives themselves have no particular claim of their own, nor do employers have obligations to the trade unions in themselves – it remains workers who are participating in those decisions, *through* the trade unions.

It may be taken as given that collective bargaining amounts to more effective participation by workers in decision-making than individual contractual negotiations.[192] But effectiveness of worker participation must be balanced against efficiency of decision-making – and the argument goes that an obligation to recognise trade unions for purposes of negotiation would cause too great an efficiency loss in productive decision-making. However, this only works if we operate from a baseline norm of concentration of power in management hands – which the theory of citizenship developed here cannot.[193] We have

[192] This is, of course, the underlying presumption of trade union activity – that 'the union makes us strong' enough to overcome the notorious 'inequality of bargaining power' discussed in Chapter 3.

[193] We might also challenge the idea of efficiency costs of participation on their own terms. There is a very real prospect that greater worker involvement in decision-making may generate productivity gains in a broader sense – either because workers are more motivated when they have agency, or because they bring on-the-ground information into the relevant decisions. Ultimately, this is an empirical question beyond the scope of this thesis to answer, but there is ample support for that view in the literature: see, for example, European Commission Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, COM(2020) 682; Frank Manzo IV and Robert Bruno, *Promoting Good Jobs and a Stronger Economy* (Illinois Economic and Policy Institute 2021) <https://illinoisepi.files.wordpress.com/2020/05/ilepi-pmcr-promoting-good-jobs-and-a-stronger-economy-final.pdf> accessed 26 April 2021; Jan Kees Looise, Nicole Torka and Stefan Zagelmeyer, 'Industrial Relations Systems, Innovation, and Economic Performance: Uncovering Myth and Reality from a Dutch Point of View' (2012) 28(2) International Journal of Comparative Labour Law and Industrial Relations 249;

already demonstrated that the citizenship of workers *demands* meaningful participation in productive decision-making. From this norm, it must be *more* efficient for workers to participate collectively, through a representative, rather than individually. Accepting that *some* form of meaningful participation is necessary, collective participation is more efficient than individual.[194] We might even say workers have a *stronger* claim to participate where they do so collectively, out of concern for efficiency – that their individual claim to participation could be legitimately defeated by the employer's claim to efficiency, unless the workers have organised in a union.

What this looks like in practice is a strategy of rationalisation (like the legislation impugned in *NUR*),[195] or the imposition of conditions of 'representativeness' on unions in order to legitimate their participation in productive decision-making.[196] Though alien to the Irish voluntarist system, guided as it is by the (flawed) notion of 'freedom of association', representativeness conditions are widely imposed in continental European jurisdictions, albeit with great variety between them. Again, it is beyond the scope of this thesis to compare models of industrial relations,[197] but it is plausible that in determining whether, for example, it is constitutionally permissible to impose an obligation to recognise unions for collective bargaining, conditions of representativeness (in particular membership numbers) increase the legitimacy of that obligation.[198] It is worth observing that this may also be in the interests of employers too: if it is more efficient to deal with trade union representatives than each worker individually, then it must be more efficient for employers to deal with one union representing all their workers rather than several unions at once. Of course, this logic only stands up under certain conditions of industrial relations. In

Annette van den Berg, Arjen van Witteloostuijn and Olivier van der Brempt, 'Employee Workplace Representation in Belgium: Effects on Firm Performance' (2017) 38 International Journal of Manpower 130; Sian Moore, Ozlem Onaran, Alexander Guschanski, Bethania Antunes, and Graham Symon, 'The Resilience of Collective Bargaining – a Renewed Logic for Joint Regulation?' (2019) 41(2) Employee Relations 279.

[194] Of course, trade unions in particular might sometimes be less efficient than other forms of participation – different elements of the 'mixed constitution' of workplace democracy might be more or less efficient, in the particular contexts of different areas of decision-making. This suggests we should channel different kinds of decision into suitable forms of participatory decision-making, while respecting the advantages trade unionism offers that we set out in the previous chapter. It does not justify a denial of collective participation rights.

[195] *NUR v Sullivan* [1947] IR 77.

[196] See also Niamh Howlin and Robert C Fitzpatrick, 'The Feasibility of Mandatory Trade Union Recognition in Ireland' (2007) 29(1) Dublin University Law Journal 178. This will be discussed further in the next chapter.

[197] For more information, see Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021).

[198] Keith Ewing and John Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46(1) Industrial Law Journal 23, 50.

particular, very strong union factionalism undermines the case for their central role in collective participation. Some of this will be returned to in the next chapter.

Conclusion

This chapter surveyed Irish constitutional jurisprudence on collective representation of workers and fair procedures in disciplinary proceedings, for the purposes of illustrating two complementary aspects of worker participation within the enterprise. A theory of constitutional labour law needs to engage with concerns around the scope of horizontality, waiver and adaptation of rights. Our theory can learn from the Irish experience in that respect, where the right to fair procedures has been adapted to the workplace context and applied in the face of silent or even contradictory employment contracts. This aims to vindicate the value of participation for individual workers.

Regrettably, the Irish courts have not accorded equivalent esteem to collective participation. The extent of this divergence is unwarranted: while there are important distinctions between negotiations over terms and contesting disciplinary sanctions, these are driven by the same underlying logic of participation in decision-making, a core value of citizenship. Even accounting for the efficiency concerns of the employer, there is a strong case for greater collective participation in decision-making, when we approach the issues from the perspective of citizenship rather than a managerial norm.

Viewing the case law in light of our theory of constitutional labour law suggests that the Irish courts have things the wrong way around: rather than saying workers have a claim to participation individually but not collectively, instead whatever claim they have to participate individually is all the *stronger* when they act collectively. Collective action is not only more effective than individual action, but also more legitimate. Likewise, we can see that employers will be less concerned about (putative) efficiency losses from participatory decision-making if these costs are borne by everyone else too – so there is no relative disadvantage in a competitive marketplace. This leads us to the next chapter: an analysis of how the value of participation and representation should be realised outside the workplace, through regulatory institutions operating on a subsidiary basis to the state's political institutions. Again, we will use Irish constitutional jurisprudence as a test case for examining these issues.

CHAPTER 8:

IRELAND: PARTICIPATION OUTSIDE THE WORKPLACE

Introduction

Chapter 6 drew attention to the 'labour constitution' model of labour law, by which workers and their organisations should be given an institutional role in shaping the economy. It focused on trade unions' role in the political system and their activities within the workplace, only tangentially referring to arguably the most significant aspect of the Sinzheimer-Dukes approach: unions' participation in subsidiary institutions for regulating sectoral or national economic policy. Having looked at the role of worker participation within the workplace in Chapter 7, it is now time to examine the role of participation outside the workplace – again through the prism of Irish constitutional jurisprudence.

In Ireland, this has historically been called 'Social Partnership', and has been credited by some with contributing to high levels of economic growth in the 1990s and 2000s.[1] Here is not the place to discuss the economic effects of sectoral and national collective bargaining; instead we will focus on its *democratic* credentials. The argument advanced is that conceiving of constitutional labour law from the perspective of citizenship leads to the conclusion that some form of 'bargaining beyond the workplace' is necessary for workers to realise that citizenship. Entrenched subsidiary regulatory institutions in which workers and their representatives can participate play a vital role in promoting the citizenship of workers.

The constitutional position of such institutions is an area that has received extensive scrutiny in Ireland. Historically, the courts have been sceptical of legislative attempts to establish robust labour institutions with regulatory and adjudicatory processes that facilitate participation of workers' and employers' representatives, but there has been a recent pivot in the jurisprudence towards a much more favourable approach. This chapter will compare

[1] Seamus McGuinness, Elish Kelly and Philip J O'Connell, 'The Impact of Wage Bargaining Regime on Firm-level Competitiveness and Wage Inequality: The Case of Ireland' (2010) 49(4) Industrial Relations 593; Vincenzo Maccarrone, Roland Erne and Aidan Regan, 'Ireland: Life After Social Partnership' in Torsten Müller, Kurt Vandaele and Jeremy Waddington (eds), *Collective Bargaining in Europe: Towards and Endgame* (ETUI 2019) ch 15.

the current position with that which came before to extract valuable insights into the role subsidiary labour institutions play within a broader constitutional framework.

Industrial relations landscape

First, however, it is worth setting out the relevant Irish constitutional and statutory framework in this area. Recall from Chapter 7 the provision of Bunreacht na hÉireann that deals with freedom of association:

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality… the right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.[2]

Also relevant for the discussion below are the provisions dealing with the location of legislative and judicial power in the state:

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.[3]

> Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.[4]

> Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.[5]

[2] Article 40.6.1.iii.
[3] Article 15.2.1.
[4] Article 34.1.
[5] Article 37.1.

As will be seen below, the Irish state (like many others across Europe) developed throughout the course of the twentieth century a system of subsidiary regulatory institutions in the field of labour and industrial relations. The most important pieces of legislation were the Industrial Relations Acts 1946, 1969 and 1990 (and various amendments thereto), provisions of which will be considered in detail below, where they are relevant to significant constitutional cases. These Acts established a tiered system of adjudication in employment litigation: broadly speaking, the Labour Court heard appeals from first instance Rights Commissioners; Industrial Relations Officers heard applications in respect of disputes between trade unions and employers, and facilitated voluntary negotiation.[6] Partly as a result of the cases to be considered below, the Industrial Relations (Amendment) Act 2015 and the Workplace Relations Act 2015 streamlined the system into the Workplace Relations Commission and the Labour Court with many of the same functions but, as we will see, truncated powers.

It will be argued below that this jurisprudence demonstrates a failure on the part of Irish courts to appreciate the nature of citizenship and the scope of its influence on constitutional labour law. Although this is to be regretted, again, this thesis is not a doctrinal critique of Irish law. What follows is intended to illustrate important practical issues for the theory, and draw contrasts between a theory based on citizenship and what the Irish courts have produced. Cases will be surveyed which examine the relationship between social partners and the state on a structural or institutional level, the delegation of regulatory functions to the social partners (through subsidiary institutions) in recognition of their expertise and democratic credentials, and the safeguards the courts have insisted must apply to this investment of regulatory power in subsidiary institutions.

State recognition of social partners

The first area of case law to be considered is the structural interaction between social partners (particularly trade unions) and the state. The case of *NUR v Sullivan*[7] has already been discussed in the previous chapter. Freedom of association in that case was invoked to

[6] This history is deliberately given in the briefest possible terms, merely to assist the reader in approaching the case law to follow. For a detailed account, see Tony Kerr, *The Trade Union and Industrial Relations Acts* (Round Hall 2015).
[7] [1947] IR 77.

strike down a nascent labour institution, the Trade Union Tribunal, which would have allowed the state to recognise specific trade unions and confer on them sectoral monopolies of recruitment and negotiation. The criticisms of that understanding of freedom of association will not be rehearsed here. Of course, that case did not preclude any state recognition of trade unions: under various legislation, trade unions are required to hold statutory licences.[8] It is unnecessary to dwell on the myriad ways the state regulates trade unions – this chapter focuses on efforts by the state to incorporate collective bargaining within an institutional framework, the treatment of such efforts by the Superior Courts, and the principles underlying that treatment (which has mostly been unfavourable, until very recently).

The Supreme Court judgment in *NUR* was narrowly focused on the compatibility of statutory recruitment monopolies with freedom of association. Finding that this was a 'denial' of freedom of association rather than its 'regulation', the Court did not have to consider whether that regulation was in the public interest. By contrast, in the High Court, Gavan Duffy J had examined the question of whether the Oireachtas could designate a subordinate regulatory body (the Trade Union Tribunal) to determine whether the public interest demanded a single union be granted a monopoly, and if so, which union and under what conditions (as the statute purported to provide). His reasoning was as follows: it is clearly in the public interest to have industrial peace, and also to 'strengthe[n] the power of workmen' to improve their conditions.[9] How best to accomplish (and perhaps reconcile) those aims is difficult and requires specialist knowledge and intense engagement with the relevant actors. It is therefore in the public interest to have a subsidiary regulatory agency in this field: 'The power of [the] legislature to entrust its mandates to subordinate agencies is … generally unassailable',[10] absent a conflict with constitutional rights (which he found not to be the case, though the Supreme Court would overturn on this point).

Later, however, this power would indeed be assailed. In *Burke v Minister for Labour*,[11] Henchy J in the Supreme Court criticised the framework established by the Industrial Relations Act 1946 that allowed the Labour Court to establish a sectoral Joint Labour

[8] Trade Union Act 1941, section 7 (as amended).
[9] [1947] IR 77, 86.
[10] [1947] IR 77, 89-90 (HC, Gavan Duffy J).
[11] [1979] IR 354.

Committee (JLC) consisting of representatives of trade unions, employers and the state, for the purposes of drawing up an Employment Regulation Order (ERO) which, by order of the Labour Court, would be binding on all employers and workers in the relevant sector. Henchy J spoke about the 'most fundamental, permissive and far-reaching power' conferred on JLCs;[12] however, the judgment was confined to invalidating a particular ERO for the hospitality sector, on the basis that the JLC had failed to follow fair procedures in conducting the hearings that led to drawing up the ERO. The broader criticism was *obiter*.

A strangely long time passed before the critique levelled by Henchy J would be picked up, and relied on to invalidate the 1946 Act itself. In *John Grace Fried Chicken v Catering JLC*,[13] Feeney J in the High Court relied on intervening developments in the doctrine of the non-delegation of legislative power[14] to strike down Part III of the 1946 Act, which provided for JLCs and EROs, as unconstitutional. He expressly relied on the characterisation of the JLC system in *Burke*. Although he accepted in principle the constitutional legitimacy of subordinate regulatory bodies,[15] he held that even if the purpose of the 1946 Act was to promote harmonious industrial relations (of which he was strangely sceptical), such a purpose was not clear enough to guide the regulator (the JLCs) in determining the details of EROs, such as particular wage levels.

McGowan v Labour Court[16] targeted Part IV of the 1946 Act, which provided for trade unions and employers to apply to the Labour Court to have a collective agreement 'registered', which would then become binding on everyone in that sector. Again, the Supreme Court relied on the *dicta* in *Burke* to criticise the Registered Employment Agreement (REA) system in Part IV as 'somewhat anomalous today'[17] and 'unusual and possibly unique'.[18] Of course, as recent scholarship has demonstrated, this was completely inaccurate in comparative context – indeed, Ireland is now a clear outlier within the EU for

[12] [1979] IR 354, 358.
[13] [2011] IEHC 277.
[14] See further: *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381; *McDaid v Sheehy* [1991] 1 IR 1; *Laurentiu v Minister for Justice* [1999] IESC 47; Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) [4.2.26]ff; Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) [8-32]-[8-35]; Conor Casey, 'The Supreme Court and the Reformation of the Non-Delegation Doctrine: *Náisiunta Leictreacht Contraitheoir Éireann v The Labour Court*' (2022) 4 Irish Supreme Court Review 39.
[15] [2011] IEHC 277, [36].
[16] [2013] IESC 21.
[17] [2013] IESC 21, [8].
[18] [2013] IESC 21, [25].

not providing legislative support for sectoral collective bargaining and extension of collective agreements, after these were struck down in *John Grace Fried Chicken* and *McGowan*.[19] O'Donnell J (as he then was) in the Supreme Court also focused on the fact that the beneficiaries of Part IV (the social partners) were 'private persons', arguing that it must be unconstitutional for the legislature to give such actors the power to make rules for third parties.[20] He also concluded that (like in *John Grace Fried Chicken*) there was insufficient guidance given as to how to draw up these rules.[21]

This framing, that the legislation must provide sufficient guidance to social partners over the content of the agreements they make, is dictated by judicial construction of the particular text of the Irish Constitution: the injunction in Article 15 that 'the sole and exclusive power of making laws' is vested in the Oireachtas and 'no other legislative authority has power to make laws for the state'.[22] Even within that paradigm though, it is worth observing that the respective Courts in *McGowan* and *John Grace Fried Chicken* apparently did not appreciate that the aim of promoting of harmonious industrial relations is pursued by the *existence* of an institutional framework for conducting industrial relations with the ability to conclude agreements that are binding on third parties. 'The promotion of harmonious industrial relations' does not need to be clear enough to guide the *content* of REAs or EROs – the fact that it is an *agreement* achieves the purpose of harmonious relations, because if 'harmonious relations' means anything, it must include at least occasionally reaching agreements. As for the fact that these agreements are 'binding on third parties' – it is only by the employer's *choice* that he is not party to the agreement. Any employer (and worker for that matter) is entitled to join a representative body that negotiates with others in pursuit of a collective agreement. Employers who choose to forego their opportunity to help decide 'the rules of the game', cannot later argue those rules should not apply to them because they did not participate in drawing them up. The whole point of the legislation is to encourage employers to negotiate: an extension system obviously encourages employers to recognise and bargain with trade unions (so as to shape the content

[19] Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021) 14ff, and 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211.
[20] [2013] IESC 21, [25], [30].
[21] [2013] IESC 21, [30].
[22] This has historically been interpreted in line with the 'principles and policies test' originating in *Cityview Press v An Chomhairle Oiliúna* [1980] IR 381, but it seems post-*Electrical Contractors*, this test has been abandoned: see Conor Casey, 'The Supreme Court and the Reformation of the Non-Delegation Doctrine: *Náisiunta Leictreacht Contraitheoir Éireann v The Labour Court*' (2022) 4 Irish Supreme Court Review 39.

of agreements by which they will be bound whether they engage or not),[23] reducing the need for recognition disputes and strikes. Unless the Court is willing to hold that it is an illegitimate aim on the part of the legislature to encourage (though not oblige) employers to negotiate with trade unions (on which more below), then the fact the legislation makes agreements binding on third parties is not a bug but a feature.

O'Donnell J does make a more nuanced point elsewhere in the judgment: a collective agreement can only become an REA if the parties to it are sufficiently 'representative' of the sector; here, there is no guidance given to the Labour Court as to how to gauge representativeness, merely an instruction that the Labour Court *shall* register the agreement, absent certain conditions.[24] If sectoral bargaining is to be based on representativeness (which it will be argued below it should) then there ought to be a dependable method for determining this. Alas, the learned judge leads himself into error again when he criticises the legislation on the bases that the Labour Court need not consider the interests of non-parties, and agreements can only be varied upon application of the original parties.[25]

Again, these are not flaws but entirely reasonable, predictable means of accomplishing the purpose of the legislation, to promote harmonious industrial relations by encouraging employers to bargain collectively with trade unions, on a sectoral basis. If employers wanted their interests taken into account in drawing up the agreement, they should have participated in negotiations. If they want to vary the rules applicable to the sector, they should join a representative organisation that can negotiate a new agreement. The legislation would have been better if it allowed *any* 'representative' party to apply for variation. This is partly because, as will be discussed below, representativeness is not a binary concept, and there may be several organisations with legitimate claims to represent workers or employers within a given industry. It was already discussed in an earlier section, in the context of closed shops, why trade union pluralism should be respected. Moreover, organisations may become more or less representative over time, so it makes no sense to privilege the original parties to the agreement. These criticisms aside, however, the

[23] Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021) 5, 31, 41, 47, 64.
[24] [2013] IESC 21, [25]-[29].
[25] [2013] IESC 21, [28].

underlying goal of the legislation (to encourage employers to bargain with representative unions) remains valid.

We need not think about collective representation of workers in terms of a 'right' to bargain collectively to nevertheless appreciate that it must be constitutionally legitimate for the state to oblige employers to recognise unions for the purposes of collective bargaining. As explained above, the imperative for workers to participate in productive decision-making, including collective bargaining through trade unions if they so choose, derives from their status as citizens. Of course, the Irish courts had rejected this in *Ryanair v Labour Court*, instead favouring the employer's 'right to operate a non-unionised company'.[26] It is obvious at this stage of the thesis that such a 'right' has no place in a model of constitutional labour law derived from the citizenship of workers.

Expertise of subsidiary regulators

We have considered the state's efforts to integrate the social partners into formalised regulatory structures. Now we turn to the role those institutions play in the regulatory process. *Ryanair* is relevant here too, as recognised by the Supreme Court in the most recent jurisprudence. First, it is worth recalling just how radical *Ryanair* was. Not only, as discussed above, did the Supreme Court find a 'right to operate a non-unionised company',[27] but it also called into serious question the feasibility of subsidiary regulatory institutions in the labour context. The relevant legislation provided, *inter alia*, that if an employer did not engage in collective bargaining, a trade union could refer a trade dispute to the Labour Court if 'the internal dispute resolution procedures (if any) normally used by the parties concerned have failed to resolve the dispute'.[28] The decision turned on whether, in fact, the employer's internal procedures (consultation with standing committees of staff representatives) were still in operation, but it was highly relevant whether the operation of these procedures could be considered 'collective bargaining'. The Labour Court had determined not, but the Supreme Court held that this determination 'betray[ed] an understandable mindset in favour of the way particular expressions are used and particular

[26] [2007] IESC 6, [58].
[27] [2007] IESC 6, [58].
[28] Industrial Relations (Amendment) Act 2001, section 2 (as amended).

activities are carried out by trade unions'.[29] Geoghegan J argued instead that because the legislation was designed to deal with non-unionised companies, terms such as 'collective bargaining' should *not* be interpreted in the way they would be used in industrial relations that typically involve trade unions. He acknowledged that 'collective bargaining' went undefined in the statute (and Irish law generally), but held the Labour Court was not free to interpret it in the way it had done. The Labour Court's definition was:

> [Collective bargaining] is not a legal term of art but it is a commonly used term in the conduct of industrial relations. In the absence of any statutory definition of the term the [Labour C]ourt must assign to the expressions the meaning which it would normally bear in an industrial relations context.[30]

By contrast, Geoghegan J said: 'It would seem strange if definitions peculiar to trade union negotiations were to be imposed on non-unionised companies.'[31] He went on to say:

> [I]t is clear that the [Labour C]ourt is acknowledging a special, what I might call, trade union meaning to the expression 'collective bargaining negotiations'. As I have indicated, my view is that it should be given simply an ordinary meaning and not any special meaning as understood in trade union negotiations.[32]

It may very well be the case that the Labour Court was wrong in that case to hold that the internal representative machinery maintained by the employer was incapable of amounting to collective bargaining, on its definition.[33] But that is not to say it was wrong to adopt its own definition, nor that it was wrong to base that definition on the ordinary practice of industrial relations. Clearly, it was the intention of the Oireachtas to defer to the expertise of a specialist body in whose operations representatives of both workers and employers participate, in respect of determining whether any particular employer engages in collective bargaining. The generalist legislature wants to accomplish certain social policy goals, which include the promotion of harmonious industrial relations by encouraging employers

[29] [2007] IESC 6, [58].
[30] [2007] IESC 6, [67].
[31] [2007] IESC 6, [68].
[32] [2007] IESC 6, [84].
[33] For a contrasting view, see Caroline Kelly and Joo-Cheong Tham, 'Democracy and Social Justice as Organising Principles' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press 2021) ch 1.

to recognise and bargain with unions. The goal of the legislature was not to give legal *imprimatur* to certain practices of employers, but to encourage recalcitrant employers to 'go with the grain' of established practice and expectations. In this context, the definition of collective bargaining is closely related to the historical development of trade unions and the political economy, and prevailing industrial relations culture and practice. It is therefore entirely legitimate to have recourse to a subsidiary body which has enjoys expertise in the relevant field *and* the direct participation of workers' and employers' representatives. Giving effect to that subsidiary expertise and participation *is* the goal of the statute.

Most recent jurisprudence: a corporatist turn?

The recent decision of the Supreme Court in *Náisiúnta Leictreach Contraitheoir Éireann v Labour Court*[34] takes a much more sophisticated approach to the role of social partners and sectoral collective bargaining, recognising that the pursuit of certain social and economic policy goals depends on the relationship between the national legislature, subsidiary regulatory institutions, and representatives of workers and employers who participate in the operations of those institutions.[35]

Electrical Contractors concerned a challenge to the legislation brought in to replace the parts of the Industrial Relations Act 1946 that had been struck down in *McGowan*. The Industrial Relations (Amendment) Act 2015 provided for a system of Sectoral Employment Orders (SEOs), issued by the relevant government minister at the recommendation of the Labour Court, after a process of hearings in which trade unions, employers and other 'interested parties' could participate. As it operated in practice, trade unions and employers could agree in advance a collective agreement and present this to the Labour Court, inviting the Court to base the SEO on the terms of the agreement. Like EROs and REAs before them, SEOs would be binding on all actors within the relevant sector. The High Court struck down the SEO system as unconstitutional on the same basis as *John Grace Fried Chicken* and *McGowan*: that it impermissibly delegated the power to make 'policy choices'

[34] [2020] IEHC 303; [2020] IEHC 342; [2021] IESC 36 (hereafter '*Electrical Contractors*').
[35] Much of what follows is based on two articles the author has published on the *Electrical Contractors* saga: Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211, and 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029. Rather than quoting from those articles, they are paraphrased, and only cited in this section where absolutely necessary.

to the Labour Court and, implicitly, the social partners. In the language used by Dukes, the High Court decision (combined with the decisions in *John Grace Fried Chicken* and *McGowan*) suggested that the courts view the 'labour constitution' in tension with the 'political constitution', insofar as undermines the exclusive authority of the national legislature. Elsewhere, the author has described this decision as representing 'an unusually restrictive view, in comparative perspective, of the legitimacy of social partners and specialist bodies in setting labour standards and regulating aspects of the economy',[36] and potentially out of step with Ireland's obligations under international law.[37]

Thankfully, this decision was overturned on appeal. The Supreme Court judgment rewards careful analysis of its understanding of the political economy of Irish constitutionalism. First, the judgments of both MacMenamin and Charleton JJ repeatedly characterise the SEO system as a form of collective bargaining; whereas formally, it is administrative regulation by the Labour Court and the Minister, that features participation by the social partners in the Labour Court's decision-making process.[38] The Supreme Court thereby endorsed this 'bargaining by the back door' model of subsidiary labour regulation. MacMenamin J rejected the impression from *McGowan* that *erga omnes* extension of collective agreements would always be unconstitutional, ruling instead that the problem was the lack of 'procedural safeguards' in the decision-making process of the Labour Court under the 1946 Act.[39] At the level of principle, the Supreme Court recognised the legitimacy of: (a) setting common standards for industry, even if that has differential effects on some employers and compromises the freedom of contract on the part of businesses and individuals; (b) assigning the setting of those standards to specialist, subsidiary institutions outside the parliamentary political process (albeit with political oversight); and (c) involving the social partners in the setting of those standards (subject to procedural safeguards for affected parties, and democratic accountability). The Court expressly accepted that such subsidiary bodies are entitled to make 'difficult policy choices' if the Oireachtas so provides.

[36] Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211, 220-21.
[37] Alan Eustace, 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211, 220. See also Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021).
[38] Alan Eustace, 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029, 1035.
[39] Alan Eustace, 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029, 1036.

The Court recognised that promotion of harmonious industrial relations, by means of collective bargaining, is a part of the common good which the legislature is entitled to pursue by establishing subsidiary institutions in which the social partners can participate, and by encouraging them to so participate by means of incentives like extension of collective agreements. This is in keeping with Bogg's idea of supportive 'perfectionist state intervention' – the state is helping the social partners to help themselves, rather than usurping their functions.[40] As such, it serves an entirely legitimate public purpose. Despite referring to *Ryanair* in another context, neither written judgment made any reference to the comments of Geoghegan J reproduced above: it was not contended that this policy choice of the legislature was subject to any right of employers not to recognise independent trade unions. Crucially for present purposes, it was recognised as legitimate for the legislature to assign the fraught task of identifying what would qualify as harmonious industrial relations to a specialist subsidiary regulator (subject to some safeguards which will be discussed) – a subsidiary body whose very operations embody harmonious relations, because they are based on the participation of workers' and employers' representative organisations.

Safeguards on subsidiarity

Participation is the most important qualification of the legislature's power to assign the determination of labour standards to a subsidiary body, because it is the wellspring of that subsidiary body's legitimacy to determine those standards. In *Electrical Contractors*, it is portrayed as a 'safeguard' against impermissible delegation of legislative power, but is better thought of as speaking to the legitimacy of the choice of delegate. The legislature is not simply trying to set appropriate standards for working conditions – although even if that were the only goal, the expert Labour Court would be a good delegate. The legislature is pursuing the *distinct* good of bringing labour and capital together to identify those standards. It is not simply about finding 'good' outcomes, but *legitimate* outcomes, by reference to how they were reached. The participation of workers' and employers' representative organisations in the management of economic affairs, through established structures and institutions, is itself a valuable policy goal for the legislature to pursue, quite

[40] Alan Bogg, 'Subsidiarity or Freedom of Association? A Perspective from Labour Law' (2016) 61(1) American Journal of Jurisprudence 143, 155ff.

apart from the valuable goal of appropriate labour standards.[41] This is because participation is necessary for citizenship, and the state has an interest in helping its population develop as citizens. A sophisticated understanding of constitutionalism allows the state to pursue that goal.

It is worth recalling the exhortations of Chapters 4 and 5 not to equate citizenship with the electoral process, but rather participation in public life in a much broader sense. We will see momentarily that political oversight of subsidiary labour institutions may be valuable, but there is distinct value for the citizen in being able to participate in subsidiary institutions. It is beyond the scope of this thesis to expand on the moral and political value of subsidiarity *per se*,[42] but it is clear that distinct labour institutions allow for a more focused expression of workers' preferences and interests, on concrete questions of their material well-being and conditions of daily life. Bogg argues convincingly that subsidiarity acts as a better guiding value than 'freedom of association' in identifying the values of trade unions, and potential forms of support the state can offer workers' organisations to make their representation of worker more effective.[43] In the absence of dedicated, expert bodies with defined channels of participation (through dedicated representative bodies like trade unions), it is too easy for these distinct interests of workers to be diffused and diluted in the wider political process. Establishing dedicated institutions also allows for their operation to be calibrated so as to empower workers, overcoming barriers and weaknesses that might

[41] But it is also likely that participation by the social partners will result in better regulation. Harry Woolf, Jeffery Jowell, Catherine Donnelly and Ivan Hare, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2018) [6-007] say: 'Participation… can greatly improve the quality of official decisions by providing the decision-makers with information they might not otherwise receive'. As Megarry VC memorably put it *John v Rees* [1970] Ch 345, 402: 'As everyone who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' Citing this passage with approval in *Dawson v Irish Brokers Association* (SC, 27 February 1997), O'Flaherty J added: '[In] the labour relations field… often both parties to a dispute travel the same road to Damascus, even if on opposite sides of the road.' For more, see Alan Eustace, 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).

[42] See, among many others, Pope Leo XIII, *Rerum Novarum* (1891); Pope Pius XI, *Quadragesimo Anno* (1931); Andreas Føllesdal, 'Competing Conceptions of Subsidiarity' (2012) University of Oslo Faculty of Law Legal Studies Research Paper Series, No 2012-35; Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50(2) Journal of Common Market Studies 267, 268ff; NW Barber and Richard Ekins, 'Situating Subsidiarity' (2016) 61(1) American Journal of Jurisprudence 5; Trevor Latimer, 'Against Subsidiarity' (2018) 26(3) The Journal of Political Philosophy 282; NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) ch 7.

[43] Alan Bogg, 'Subsidiarity or Freedom of Association? A Perspective from Labour Law' (2016) 61(1) American Journal of Jurisprudence 143.

hinder their participation in broader politics.[44] Focusing the determination of working conditions within specific institutions makes workers' participation in public life both more feasible and more worthwhile.

Other 'safeguards' identified by the Supreme Court in *Electrical Contractors* include: the negotiation process must be governed by a detailed statutory framework; negotiations must take place within a public regulatory body; although organisations may have to demonstrate representativeness to trigger negotiations, a broader range of interested parties must be allowed participate; and the ultimate decision on whether to extend agreements must rest with the state, with political oversight of the potential effects of the resulting agreement.[45] Elsewhere, the Supreme Court has held that regulatory institutions are obliged to follow fair procedures in the discharge of their functions.[46] Two of these are worth exploring further: representativeness and political oversight. While very significant as a matter of Irish constitutional labour law, it will not be possible to explore here the Court's concern for fair procedures to be followed in the negotiations and hearings in the Labour Court; the previous chapter has already demonstrated the normative value of fair procedures.

(a) Representativeness

There is a significant volume of literature in labour scholarship on the representativeness of social partners, which it will be impossible to canvass here.[47] Briefly, a representative trade union is one which enjoys a sufficiently high level of support within a segment of the workforce as to legitimately speak for the interests and preferences of the segment as a whole, such as to justify granting them special powers that smaller trade unions do not enjoy.

[44] For more on these, see Chapter 5.
[45] A similar attitude was adopted by the CJEU in C-928/19 P *EPSU*, [58]ff.
[46] *Zalewski v Workplace Relations Commission* [2021] IESC 24. But note the concerns expressed by Michael Doherty, 'An Outpost at a Difficult and Indistinct Frontier: *Zalewski v Workplace Relations Commission*' (2022) 4 Irish Supreme Court Review 65.
[47] What follows is primarily drawn (unless otherwise stated) from Eurofound, *The concept of representativeness at national, international and European level* (Publications Office of the European Union 2016) <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1644en.pdf> accessed 2 February 2022.

Four points should be made: first, conventionally we may think of membership as the means of gauging the level of support of a union, but it can also be judged by employer recognition, institutional features like capacity to negotiate, or by the results of elections to established labour regulatory institutions, whether these are inside companies or otherwise. Second, different jurisdictions cast the breadth of the segment at different points: for example, in industrial relations cultures wherein unions organise cross-sectorally, the relevant 'segment' of which the union must be representative is the labour force as a whole. Third, different jurisdictions cast the applicable level of support (*eg* membership rate) at different heights. Finally, the legal consequences of representative status vary across jurisdictions. For an example of all four, consider the legislation impugned in *NUR v Sullivan*: an effort by the Irish state to set the relevant criterion for representative status at a membership rate of 50% of the workforce in a sector of the economy (a relatively high bar in comparative perspective),[48] with the consequences of a temporary monopoly on organisation and negotiation within that sector (again, a relatively extreme result). For historical or political reasons, some jurisdictions grant legal presumptions of representativeness in favour of certain trade unions – France being a notable example.[49]

Here is not the place to divine the 'right' method for determining representativeness, if such a thing can be stated in isolation from industrial relations culture and historical contingencies.[50] Moreover, different levels of representativeness may be appropriate for different areas of industrial relations: for example, the threshold for the sectoral extension of a collective agreement might be different from the threshold to be consulted on health and safety by an employer. Moreover, we might have to ask for what purpose any given organisation is representative – for example, a disproportionately male-membership trade union might not be appropriately representative to bargain with an employer over measures

[48] Eurofound, *The concept of representativeness at national, international and European level* (Publications Office of the European Union 2016) <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1644en.pdf> accessed 2 February 2022; see also Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021).

[49] Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021) 32ff.

[50] It may also be observed that the recent historical trend has been for the state to actively make it more difficult for trade unions to reach representative status: see Eurofound, *The concept of representativeness at national, international and European level* (Publications Office of the European Union 2016), available at <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1644en.pdf> in particular 9: '[the report] suggests that, before 1989, making detailed demands on the social partners to "prove their credentials" was a rare occurrence. Subsequently, the practice has become more common'; accessed 2 February 2022.

to address the gender pay gap or maternity policies; a disproportionately able-bodied trade union might not be representative for managing reasonable accommodation for people with disabilities. We want to see some *additional* mechanism for participation that better represents those most affected by the decisions – or rather, better includes those particular workers within the collective decision-making process.[51] It is not necessary to find a universal norm, to nevertheless appreciate the importance of unions being representative in order for them to adequately function as a means for workers to participate in the governance of the enterprise, industry or economy. This is particularly the case where a jurisdiction operates a 'single channel' of worker representation.[52] It should be noted we are talking about 'input legitimacy' or democratic credentials, rather than 'output legitimacy' in the sense of the outcomes trade union involvement in labour regulation may deliver, especially material benefits for workers.[53] Of course, we observed in Chapter 3 that many workers care more about the latter – but in developing a theory of constitutional labour law from the perspective of citizenship, it is obvious that we must focus on input legitimacy of trade unions, which depends on their democratic credentials.[54] This was recognised by the Court of Justice of the EU in *UEAPME*:

> …the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process –

[51] This principle has limits: workers, through their representatives, still enjoy legitimacy to participate in decisions that affect the workforce *as a whole*, even if a specific measure may not affect a particular worker (or their representative) *individually*. In some circumstances, it may only be possible to ensure the voices of the workers who are particularly affected are given adequate weight in the deliberation – rather than effectively outsourcing the decision entirely to them. Otherwise, *collective* decision-making will be significantly restricted. The parallel is with parliamentary government of the state: we obviously want legislators to be sufficiently 'representative' of the electorate (including of demographic, socio-economic, *etc* diversity), but we do not expect legislators to have personal experience of every issue on which they make decisions, nor to be individually affected by every decision.

[52] See Eurofound, *The concept of representativeness at national, international and European level* (Publications Office of the European Union 2016) <https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1644en.pdf> 27, accessed 2 February 2022.

[53] Caroline Kelly and Joo-Cheong Tham, 'Democracy and Social Justice as Organising Principles' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press 2021) ch 1, 2-3.

[54] Brian Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28(2) Industrial Law Journal 153 strongly criticised the requirement that state bodies verify representativeness of social partners and the inclusiveness of the bargaining process in the context of social partnership at EU level, and the decision of the Court of First Instance in Case T-135/96 *UEAPME*. He argued this was an unjustified interference with the autonomy of the social partners. However, as explained in Chapter 6, the state depends on trade unions being structured and conducting themselves in a certain way to promote the citizenship of workers. With all due regard to subsidiarity (see above) the state has a legitimate interest in ensuring this is the case, even if this amounts to an interference with trade union autonomy in certain limited respects.

> that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement…[55]

According to Sempill, the traditional assumption of liberal democracy is that working people must rely on the national political process to exert any influence over the conditions of their workplace, beyond that which they can bargain for individually (which, for the reasons canvassed in Chapter 3, will be limited).[56] Trade unions often play along with this – recognising the constraints in which they act, they quite correctly participate in electoral politics in the ways described in Chapter 6. The primacy of electoralism in liberal democracy also informs the need for civil liberties in the workplace, as to be discussed in Chapters 9 and 10. But this primacy of electoralism is a profoundly limited understanding of democracy, and participation in electoral politics a profoundly limited exercise of citizenship, as explored in Chapter 4. Sempill characterises this focus on electoralism as a function of 'the unwritten capitalist-democratic constitution',[57] arguing instead that worker participation in decision-making must be extended to the workplace and economic activity more broadly, in order to 'reviv[e] the impulse to economic democracy [and] encroach upon plutocracy – economic autocracy – in the name of democracy'.[58]

Elsewhere, the author has commented that the Supreme Court in *Electrical Contractors* opened up the potential for a model of 'pluralist corporatism'.[59] The Irish Supreme Court in *Electrical Contractors* was concerned with representativeness in a negative sense: if trade unions are going to have special powers (to negotiate agreements which may be extended to cover third parties), it is imperative that this only happens where the parties are sufficiently representative. On this view, representativeness is a compensation for the perceived loss of democratic legitimacy in having regulations made by 'private actors' (as identified in *McGowan*). However, the Court was anxious to impose an additional condition: that a wide range of 'private actors' (*ie* minority unions and employers'

[55] Case T-135/96 *UEAPME*.
[56] Julian A Sempill, 'Nobody Owns the Future' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press 2021) ch 3.
[57] Julian A Sempill, 'Nobody Owns the Future' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press 2021) ch 3, 28.
[58] Julian A Sempill, 'Nobody Owns the Future' in Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and the Role of Trade Unions: We the Working People* (Anthem Press 2021) ch 3, 27.
[59] Alan Eustace, 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029.

organisations) be able to participate in the decision as well. At first glance, this is curious: if only a representative union can 'trigger' the sort of participatory mechanism that may lead to a collective agreement being extended, the benefit of bringing into that mechanism parties that are *less* representative is unclear. The answer seems to lie in the Court's suspicion that no trade union could ever *really* be sufficiently representative to justify exclusive bargaining rights. We can see this as part of the Scylla-and-Charybdis legacy of *NUR v Sullivan*: the state can neither impose a mechanism to identify the most representative unions and strengthen them in the bargaining process by making them even more representative, nor confine bargaining to unions that are already more representative than others. There must always be more room at the bargaining table. However, the broader the cacophony of voices within industrial relations, the more difficult it is for the state, employers and workers themselves to identify which unions are best able to represent workers' interests and preferences. This discourages employers from negotiating with, and workers from joining, any union at all. This leads to the conclusion that nobody is particularly representative, and all stakeholders should have the same (limited) opportunity to present their claims.[60]

Instead, we must remember that representativeness functions as a 'legitimating condition' in both senses of the phrase: it can be both a *condition* and *legitimating*, both negative (in the sense just examined), and *positive*. A representative union has a legitimate claim to speak for workers, in a way that a minority union does not. That is not to say minority unions have no claims to participation in economic decision-making, nor that workers have no right to form minority unions if they so wish. But provided the threshold for representativeness is calibrated appropriately, there is something special about a representative union: it has its own democratic legitimacy to participate in decision-making, on behalf of the worker-citizens that make up its membership. To undermine the strength of a representative union and compromise its functioning is profoundly undemocratic, and an attack on the citizenship rights of workers who support that union. Those workers have a legitimate expectation that the result of their efforts to organise enough of their fellow workers to meet the representativeness threshold (whatever that may be) will be strong rights of participation, that they will be taken more seriously on foot of

[60] Guy Mundlak, 'We Create Spots from Which We Shine to Others: Organizing as a Bridging Practice between Distinct Meanings of Association' (2017) 38(2) Comparative Labor Law & Policy Journal 291, 300-01.

their representative status than other stakeholders. This encourages workers to organise broadly, rather than free-ride,[61] or form yet another minority union.[62] Of course, special powers must be earned through organising – which is, we should note, an indelibly political activity, strongly indicative of the sort of citizen we encountered in Chapter 4 that is idolised in republican theory. But those special powers are indeed organising's just reward.[63]

It is also in the interests of *employers* to streamline the collective bargaining process, so they should welcome efforts to encourage (though not coerce) workers into 'One Big Union' (at least within each sector).[64] By the same logic, employers should favour the institutionalisation of industrial relations through subsidiary regulatory bodies, which corral potentially disparate workers' representative organisations into a dependable process for negotiations.

(b) Political oversight

Thus far we have alluded to the inadequacies of confining workers' political participation to electoral politics. We have established the need to multiply the channels of participation and create new *loci* for citizenship, including subsidiary regulatory institutions, and the enterprise itself. However, we should not forget the lessons learned at the end of Chapter 3: a key historical goal of the labour movement has been to broaden the electoral franchise to include the working class, and labour organisations are intensely concerned with preparing workers for participation in the political system (as we saw earlier in this chapter). This last section will bridge the gap between subsidiary participation at enterprise and industry level, and the political process *stricto sensu*.

By definition, subsidiary institutions leave some people out. Democracy always creates 'boundary problems' – for any group of people to be citizens and thus entitled to participate

[61] Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021) 5, 31, 33, 36-7, 40, 64.
[62] One is reminded of the critique of 'splitters' offered in Monty Python's *Life of Brian* (HandMade Films, 1979): <https://www.youtube.com/watch?v=YawagQ6lLrA> accessed 12 February 2021.
[63] For a discussion of the relationship between organising, representativeness, legitimacy and democracy, and between enterprise and higher-level bargaining, see Guy Mundlak, 'We Create Spots from Which We Shine to Others: Organizing as a Bridging Practice between Distinct Meanings of Association' (2017) 38(2) Comparative Labor Law & Policy Journal 291.
[64] To borrow the phrase from the Industrial Workers of the World.

in the decision-making, someone else must be excluded from citizenship and thus not entitled.[65] Despite the very good reasons canvassed above for devolving power to regulate economic life to those most intensely involved in it (workers and employers), and the strong *prima facie* legitimacy that attaches to workers' representative organisations and the institutions they participate in that we have just discussed, these have obvious blind spots (like all organisations and institutions). To acknowledge these is not to succumb to the contention that trade unions exist to protect 'insiders' in the labour market.[66] Rather, it is to remind ourselves that the basis for our defence of worker participation in decision-making at both enterprise and industry level is *citizenship*. This thesis has consistently stressed the connection between what happens in the workplace and what happens in public life, and will continue to do so in later chapters. That connection works both ways: though our primary concern is to empower workers who would otherwise be excluded from participation in decision-making, that need not come at the expense of all the other citizens in that society.

Political oversight of subsidiary regulatory institutions is a sensible compromise between empowering citizens who are workers (in the relevant enterprise or sector), and the interests of other citizens who, while not directly involved in the enterprise or sector, are affected by decisions relating to it. Consumers, suppliers, residents near factories, tax authorities and the users of public services those taxes fund – the more these have a say in the subsidiary institution's decision-making process, the less subsidiary it is, and the more workers' voices are drowned out. That is precisely one of the reasons we want to carve out that subsidiary regulation from the general political process. Instead, we should aggregate those other concerns by means of the electoral system, then give national political representatives a supervisory role over the subsidiary institutions. This has three additional benefits: (a) it reassures bargaining partners that they can safely push for their own interests

[65] Will Kymlicka, 'Federalism, nationalism, and multiculturalism' in Dimitrios Karmis and Wayne Norman (eds) *Theories of Federalism: A Reader* (Palgrave MacMillan 2005) ch 24, 274; Matthias Kumm, 'The cosmopolitan turn in constitutionalism' (2013) 20 Indiana Journal of Global Legal Studies 605, 613; Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016) 1-7, 20.

[66] Needless to say, the author is not persuaded by such a characterisation. For a sample of the literature, see Alan A Carruth and Andrew J Oswald, 'On Union Preferences and Labour Market Models: Insiders and Outsiders' (1987) 97 The Economic Journal 431; Steinar Holden, 'Insiders and outsiders in labour market models' (1990) 52 Journal of Economics 43; Patrick Emmenegger, 'Barriers to entry: insider/outsider politics and the political determinants of job security regulations' (2009) 19(2) Journal of European Social Policy 131; Niccolo Durazzi, 'Inclusive unions in a dualised labour market? The challenge of organising labour market policy and social protection for labour market outsiders' (2015) London School of Economics 'Europe in Question' Discussion Paper Series, no 99/2015.

without having to internalise interests they have no expertise to assess; (b) it signals that collective bargaining and industrial relations *are* intensely political affairs; and relatedly (c) it encourages workers to be interested in electoral politics, because they know that their industrial activity is connected to the political system, and incentivise them to support politicians who will support their interests in the bargaining process.

What this political oversight looks like will vary from state to state. It may be a dedicated minister who vets agreements to ensure they have followed the appropriate process and genuinely reflect the interests of the parties; it may involve laying an agreement that will be extended to non-parties before the national parliament for confirmation. What is appropriate in any particular state will inevitably depend on political culture and institutional framework, the relative strength and representativeness of social partners, and the culture (harmonious or adversarial, unified or diverse) of industrial relations in that society. All that can be said here is that the oversight exercised by the national political organs should not be too exacting – or else that will nullify the purpose of having subsidiary regulation in the first place, and disregard the legitimacy of the social partners, as set out above.

Conclusion

Examining Irish case law in light of our theory, we see a very belated realisation of the value of participation in subsidiary regulatory institutions for democratic citizenship of workers. For decades, Irish courts were sceptical of subsidiary regulatory institutions at least in part because of a perception that they will undermine the national parliament and, therefore, democracy in the state. This overlooks the fact that these institutions, and the representative organisations that participate in them, possess self-standing democratic legitimacy of their own, and are thus entirely justifiable vehicles for workers to exercise their citizenship. These institutions enhance the ability of workers to participate in shaping the important decisions that affect their lives in material and experiential ways. They build on participation within the enterprise itself, which has a dual aspect of individual discipline and collective action (considered in Chapter 7). These forms of participation, including through representatives where that makes participation more effective and efficient, are manifestations of the values of citizenship exposited throughout this thesis. The relationship of worker and employer is ‘nested’ within the more significant, from the

perspective of the state and its constitution, relationship of one citizen to another. Preserving and promoting the citizenship of workers requires they be able to participate in workplace decisions, concerning themselves and determining working conditions and the administration of production overall, inside and outside the workplace. This is not always appreciated by courts, as the Irish experience set out here has shown.

One concern the Irish jurisprudence highlighted for our theory is how to marry the 'labour constitution' and the 'political constitution', to refer back to Dukes' terminology. We want to both recognise the legitimacy of (sufficiently representative) social partners, and protect legislative autonomy and account for the perspectives of other citizens. Allowing for some political oversight of subsidiary institutions offers a way to do this. The case law therefore helps us think about measures the state might take to promote collective bargaining by social partners, integrate this within a subsidiary regulatory structure, with institutions well-equipped to deal with such questions, and the sorts of safeguards necessary to ensure the democratic legitimacy of decisions.

That concludes our discussion of the theme of participation in our theory of citizenship, and what it means for constitutional labour law. The thesis now turns to the theme of political independence.

CHAPTER 9:
POLITICAL INDEPENDENCE IN CONSTITUTIONAL LABOUR LAW

Introduction

So far in this Part, we have looked at aspects of constitutional labour law that would seem to fall on the 'labour rights are human rights' side of the literature we examined in Chapter 2 – although for the reasons explained in that chapter, that is a deficient way to think about constitutional labour law. We have justified those elements (trade unions, representation, fair procedures, subsidiary regulation) by appeal to considerations beyond the labour relationship (citizenship and democratic participation). We have also seen their impact and relevance beyond the labour relationship – to facilitate that same democratic citizenship. In this chapter we bridge the gap between 'labour rights are human rights' and 'human rights at work' (the other side of the literature explored in Chapter 2, an equally unsatisfying description), to look at the thorny issue of 'civil liberties' in the workplace: freedom of expression, privacy and freedom of religion or belief. This allows us to understand constitutional labour law in a way that resolves the problems identified in Chapter 2, a way that encompasses both traditional 'labour rights' and the kinds of civil liberties that seem at first glance to fit uneasily within labour law. Marrying these seemingly disjunctive areas of law is necessary to explain and justify constitutional labour law.

This chapter will offer a reasoned basis for the relevance of these sorts of rights to the citizenship project at the heart of this thesis. To that end, four justifications for civil liberties at work will be offered: contestation, diversity, moral independence and integrity. Together these will be presented as justifying rights of workers against employers to freedom of expression, the free practice of religion or philosophical belief, privacy and non-discrimination. It should be borne in mind that, as explained in Chapter 5, the content of these rights may need to be adjusted in the context of employment, or balanced in certain circumstances against legitimate concerns of employers. The next chapter will offer a reasoned way to make these adjustments or strike this balance, and illustrate this through examining case law from the European Court of Human Rights. The four justifications given here function as values underlying this area of constitutional labour law, and as such should inform any acts of interpretation and adjudication in this field.

Civil liberties in the workplace: a contemporary flashpoint

Even a cursory survey of the jurisprudence and literature indicates that this area has become increasingly fraught in recent years. Of course, employers have always attempted to curtail the political or other expressive activities, and shape the beliefs, of their workforce – including through 'captive audience meetings' to discourage workers from joining trade unions[1] and rallies for particular political candidates and causes.[2] The apotheosis of employer control over expressive activity is blacklisting: most frequently deployed against trade union activists, but also commonly targeted at left-wing political activity more broadly.[3] On the other hand, many conservatives (and some liberals) are anxious about dismissals seemingly motivated by employers promoting progressive causes: the much-demonised 'cancel culture' of so-called 'woke capital'.[4]

The concern is not necessarily over the content of particular beliefs (some will be entirely admirable) but how company 'values' are enforced against workers and the effect this has on democratic citizenship. Academic research has highlighted many examples of dismissal for activity on social media, both political and personal in nature,[5] and a generally 'illiberal' trend in employer control over workers' expression.[6] One does not need to be a hardened 'culture warrior' to be concerned about employer power over workers in this sphere. Issues

[1] Dave Jamieson, 'This Is What It's Like To Sit Through An Anti-Union Meeting At Work' *Huffington Post* (New York, 3 September 2014) <https://www.huffingtonpost.co.uk/entry/captive-audience-meetings-anti-union_n_5754330> accessed 15 November 2021.
[2] Meghan Keneally, 'Miners angry they were "forced" to go to pro-Romney rally and docked a day's pay... as bosses say event was "mandatory but they didn't have to attend"' *Daily Mail* (London, 3 September 2012); Grant Stern, 'Pittsburgh plant workers just revealed they had to go to Trump's rally or go without pay' *Washington Press* (Washington DC, 16 August 2019); Gideon Cohn-Postar, 'A Shell plant coerced workers into attending a Trump rally. Here's what that means for democracy.' *The Washington Post* (Washington DC, 2 September 2019). See also *Novosel v Nationwide Insurance Company* 721 F 2d 894 (3d Cir 1983).
[3] Dave Smith and Phil Chamberlain, *Blacklisted* (2nd edn, New Internationalist 2016).
[4] Corporate political pressure, including over their workers, has given rise to a whole genre of modern literature – see, for a sample: Carl Rhodes, *Woke Capitalism: How Corporate Morality is Sabotaging Democracy* (Bristol University Press 2021); Stephen R Soukup, *The Dictatorship of Woke Capital: How Political Correctness Captured Big Business* (Encounter Books 2021); Elizabeth Bruenig, 'The Rise of "Woke Capital" Is Nothing to Celebrate' *The New York Times* (New York, 28 March 2021); Kevin D Williamson, 'Woke Capitalism: A History' *National Review* (New York, 10 July 2021). Of course, many of those who are quick to criticise corporations for 'cancelling' their employees are curiously slow to criticise corporations for lobbying or donating to politicians and ideological think-tanks. But here is not the place to examine that issue.
[5] Virginia Mantouvalou, '"I Lost my Job Over a Facebook Post – Was that Fair?" Discipline and Dismissal for Social Media Activity' (2018) University College London Working Paper Series, no 2/2018.
[6] Hugh Collins, 'Is the Contract of Employment Illiberal?' in Hugh Collins, Virginia Mantouvalou and Gillian Lester (eds), *Philosophical Foundations of Labour Law* (Oxford University Press 2018) ch 3.

become potentially even more charged once religion enters the scene: we will see below recurrent disputes over diversity in the workplace and protection of equality for customers.

To begin to untangle these issues, a theory of constitutional labour law needs to identify the core values that should be brought to bear on decision-making and adjudication in this field. As has been stressed time and again, this thesis advocates a theory based on citizenship, which entails participation by workers in economic, social and political decision-making under conditions of equality and political independence. The next section will explore how that vision leads us to four values that should drive cases in the sphere of civil liberties: contestation, diversity, moral independence and integrity. Each of these will be elaborated below. The next chapter will turn to an assessment of some key flashpoints in the jurisprudence on workplace civil liberties to see how these values work out in practice.

Citizenship and civil liberties

It is taken as given that civil liberties like freedom of expression, privacy and the free practice of religion or philosophical belief are inherent in the concept of citizenship, at least in Western liberal democracies.[7] Citizenship, we will recall, has been defined as full membership of a state community, centred on political and social participation, on terms that make such participation meaningful and worthwhile, under conditions of political independence and social equality. We have spoken repeatedly in this thesis about the importance, from the perspective of citizenship, of bringing one's own judgment to bear on decision-making. That necessarily implies the freedom to make up one's own mind on political, social and moral issues (what we have called 'political independence'), including the freedom to join with others in groups or organisations for the purposes of advancing causes one believes in and putting one's beliefs into action. It must be possible to hold these views frankly and openly, without fear of excessive negative consequences. It also entails preserving one's self-respect and the respect of others for the *commitment* to (though not necessarily the *content* of) one's values. Without such respect, advocacy is neutered and deliberation impossible. Political independence is therefore the freedom to participate in

[7] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415; see also Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1994).

the democratic process without having undue pressure brought to bear by the economically-powerful. Only under such conditions as these is the participation by citizens in public life meaningful.

Of course, we have focused most acutely on political formation, expression and advocacy, but it is trite to acknowledge that one's political views are 'downstream' from general morality and community values. We can see, therefore, inherent connections between privacy, religion or conscience, and freedom of expression. Each relates to the other in the contribution made to personal moral (and therefore political) formation and expression. As we saw in Chapter 5, the kind of political independence we have referred to in this thesis is impossible without restraining employer power and influence over this individual personal formation. This is why it makes no sense to examine each of the rights that make up our heading of 'civil liberties' independently,[8] even though that is how they are typically presented in constitutions and human rights documents, and how other scholars have dealt with the subject.[9] This should be borne in mind for the next chapter too, where cases are organised thematically rather than by Convention article. Moreover, it will be seen in the discussion of these values, and the case law to follow, that the distinction between expression and actions that take place at work or are related to work, and those that take place outside the workplace or concern matters other than work, is not especially salient for the purposes of this thesis. There is some discussion of how workplace decisions and practices should be open to contestation by workers, including in public, and there are limits on how workers should treat each other and customers that may not apply to public discourse generally. However, we will see how (for example) the value of moral independence in particular infuses expression and actions both in- and outside the workplace. A theme of this thesis has been that drawing a hard line between citizenship in

[8] In respect of the European Convention on Human Rights, the most commonly-invoked in this area are: Article 8 (private and family life); Article 9 (freedom of conscience and free practice of religion); Article 10 (freedom of expression); Article 11 (freedom of association); and Article 14 (protection against discrimination on various grounds in the enjoyment of other rights).

[9] John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001); Hugh Collins, *Employment Law* (2nd edn, Oxford University Press 2010) 210ff; Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013); Elena Sychenko, *Individual Labour Rights as Human Rights* (Kluwer Law 2017); Robin Allen, Rachel Crasnow, Anna Beale, Claire McCann and Rachel Barrett, *Employment Law and Human Rights* (3rd edn, Oxford University Press 2018); Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018), 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, and 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199.

the public realm, and one's experience at work, is impossible – and attempts to draw such a line are detrimental to the polity. The location or addressee of a particular instance of expression or action may be a relevant factor in the exercise of balancing values and adjusting rights in certain circumstances; but it is not, in itself, particularly significant for the determination of the issues raised below.

This chapter argues there are four key values bound up in citizenship that are relevant for the protection of civil liberties in the labour relationship: contestation, diversity, moral independence and integrity. The labour relationship poses a threat to these values in various ways, but when properly regulated by constitutional labour law, can support their realisation in workers' lives and thus contribute to the broader project of citizenship. Each will be examined in turn.

Contestation

We have already demonstrated the need for workers to participate in productive decisions in the workplace, as well as in the political realm, if they are to function as citizens. Such participation can only be meaningful if workers can contest employer views, and indeed those of other workers who are participating in decision-making too.[10] We also already saw how trade unions and other forms of worker organisation or representative structures play a key role in making participation meaningful. Therefore, constitutional labour law should give special protection to contestatory actions and expressions of workers – in particular, trade union activists.

As will be demonstrated later when it comes to looking at some cases, courts generally accept that employers have a legitimate interest in curtailing their employees' freedom of speech both in and outside the workplace, to protect the employer's reputation and present a certain 'corporate image'. A separate, more compelling justification is that of protecting the dignity of other workers, which is not only an important good in itself (since those workers have rights too) but is also vital for preserving a harmonious working environment

[10] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper no 13-81, and 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou, *Philosophical Foundations of Labour Law* (Oxford University Press 2018).

(without which productivity is likely to fall). However, restricting workers' freedom of speech in the interests of workplace harmony causes particular problems for certain groups of workers – most obviously, trade union officials, whose campaigning activities may require them to speak critically of management and, in some cases, other workers who are undermining the efforts of the union. As will be demonstrated, speech restrictions have a 'chilling effect' on trade union activity, and provide employers with cover to dismiss troublesome trade unionists. More broadly, it makes it difficult to contest employers' views in the broader context of participating in productive decision-making.

Particularly in the context of an industrial dispute or recruitment drive, where tempers are running high and significant stakes are on the line for both workers and employers, it is problematic that a trade unionist might be afraid of speaking frankly to workers. In such circumstances, trade union leaders have to 'rally the troops', which may require evocative, even inflammatory, language.[11] Moreover, employers are typically not fond of workers who are active in trade unions, particularly if they hold leadership positions during industrial disputes. We have already made the case that trade union membership should be precluded as a grounds for dismissal (and it generally is, in the constitutional traditions we are studying). However it should be noted that a worker who is active in a union is likely to be considered a 'troublemaker' by his employer, or to have a history of conflict with management.[12] Bosses may be itching to fire trade unionists, but know they are legally prohibited from dismissing a worker for trade union activity. Disrupting workplace harmony by insulting management or colleagues, however, provides the perfect cover for a dismissal that is really motivated by the trade union activity.[13]

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[11] See, for example, *Palomo Sánchez and others v Spain* Applications nos 28955/06, 28957/06, 28959/06 and 28964/06; this case will be returned to below. A comparison may be drawn with the Irish case of *Marine Terminals Ltd v Loughman* [2009] IEHC 260, in which the defendant trade unionists called a strike and placed a picket on the plaintiff company's premises. When some of the workers at the company continued working, the trade union adopted a 'name and shame' policy, whereby they circulated posters and flyers identifying workers who were not on strike, calling them 'scabs' and accusing them of 'crimes against Irish workers'. These posters were displayed not only at the company premises, but also near one of the workers' homes. The company sought an injunction restraining the publication of this material, which was granted by the Court; however, Feeney J acknowledged that '[such terms] are strong and forceful language but they were used in circumstances where it must be recognised that they represented the entitlement of the persons expressing such views to express their views in relation to the matters in issue… [and are not] capable of being restricted by some form of injunctive relief in relation to the future use of such terms at such events as the protest march.' The injunction was granted because of the rights to privacy and to work of other workers who were identified in the flyers posted near their homes.

[12] Dave Smith and Phil Chamberlain, *Blacklisted* (2nd edn, New Internationalist 2016).

[13] *Per* the minority decision in *Palomo Sánchez and others v Spain* Applications nos 28955/06, 28957/06, 28959/06 and 28964/06, [18] (joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić): for the reasons given here, '[m]any people… economically dependent as they are upon

Bogg and Estlund discuss trade union activity and industrial action in the context of 'contestatory citizenship',[14] with trade unions being just one instantiation of a broader 'right to contest' implicit in freedom of association:

> [C]itizenship in a free and democratic society entails the right to be free from 'domination' by others… In the employment context, that entails a basic right of individuals to challenge employer decisions free from the threat of reprisals; and it also entails a right to do that in association with others, through a union or otherwise.[15]

Under the sort of democratic workplace conditions that constitutional labour law ought (we saw in Chapter 6) to pursue, the officials of a trade union in a workplace, such as a shop-steward or an editor of a newsletter, play a particular role within the social institution of the labour relationship. When a worker speaks *as a trade unionist*, such as in a newsletter or on a poster, he is participating in an important institutional process. Even if the content of his speech reflects his personal beliefs or animosities rather than official union policy, this act of speaking is qualitatively different from the exact same worker saying the exact same things 'at the watercooler' or down the pub after work. A trade unionist holds a position in the institutional framework by which a workplace community is 'governed', in the same way that in a political community, a member of parliament holds a representative position in the institutions of governance. Most constitutions afford parliamentarians a privilege in respect of speech made during parliamentary debate.[16] If they abuse their privilege, by wantonly attacking the character of a citizen, spreading falsehoods, violating someone's privacy, *etc*, they are exclusively answerable to parliament itself, which will have procedures in place to sanction members who abuse their privilege. This suggests that a trade union official should enjoy a privilege from sanction by his employer in respect of

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their employer, hesitate to speak out not because they are afraid of getting arrested, but because they are afraid of being fired. And they are right.'

[14] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper no 13-81, 3, and 'The Right to Strike and Contestatory Citizenship' in Hugh Collins, Gillian Lester and Virginia Mantouvalou, *Philosophical Foundations of Labour Law* (Oxford University Press 2018) 229.

[15] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper no 13-81, 3.

[16] For example, Article 15.12 of Bunreacht na hÉireann provides: 'All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.'

speech in his capacity as trade union official. He should instead be open to sanction *by the trade union* for abuse of his position.

However, Bogg and Estlund point out that formalised systems of worker representation are only possible *after* workers have the opportunity to contest and discuss, among themselves and in public, employer decisions and their own grievances.[17] This broader 'right to contest – question, criticize, disagree with – employer decisions about the organization, terms, and conditions of work without risking employer reprisals' is a necessary precondition to the sort of participatory and representational rights we discussed in Chapters 6, 7 and 8.[18] Moreover, some workers may choose not to be union members specifically because they are critical of a union for some of its (hopefully historical) inegalitarian positions – recall *Murtagh Properties v Cleary* from the Chapter 7.[19] Meanwhile, employers (and other workers) have a legitimate interest in ensuring that there can be a return to harmonious working relationships after any industrial dispute, *etc*. For all these reasons, we do not want to vest too broad a disciplinary privilege in trade unions in respect of their members' contestatory speech acts. A reasonable balance is as follows: courts should, in general, be very slow to accept as justified a dismissal of a worker for contestatory speech, particularly where this is channelled through a representative trade union (for reasons discussed in the Chapters 7 and 8). The only legitimate reason for a dismissal is if the actions of the worker are likely to seriously impair the ability to work together again in future (a higher bar than merely causing offence or upset to management figures or other workers).[20] Even in such circumstances, different standards apply for union officials: when a worker speaks in the capacity of a union official, the employer has more latitude to sanction the worker if (and only if) the trade union does not have adequate internal disciplinary structures in place to discern what is an abuse of the union privilege.[21] This does not mean simply mean where the employer *disagrees* with the internal union decision, but where it is obviously deficient.

[17] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper no 13-81, 3.
[18] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' (2013) New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper no 13-81, 4.
[19] [1972] IR 330.
[20] This will be elaborated in the next chapter in the context of *Palomo Sánchez and others v Spain* Applications nos 28955/06, 28957/06, 28959/06 and 28964/06.
[21] Defining 'in the capacity of a trade union official' is an exercise that should, first and foremost, be left to the union itself. Respecting trade union autonomy precludes detailed prescription on how unions should structure themselves. Moreover, we do not insist here on rules as to what *content* of speech falls into 'trade

That is not to say contestatory speech acts by non-unionised workers should not be protected, but that non-unionised workers enjoy less protection where their speech is likely to seriously impair working relationships. This does, of course, privilege officials of representative unions. But this stance of 'conditional privilege' is justified by the value of contestation, and by trade union autonomy, subject to the conditions of democratic legitimacy of unions we discussed in Chapters 6 and 7. It encourages workers to be active in a union to enjoy the privilege, but also encourages unions to behave responsibly to retain it.

Of course, trade unionists do not merely communicate with employers or other workers. For union activity to be most effective, its message needs to reach a wider audience: workers at other businesses who might be inclined to take sympathy action, and the wider public, to avoid crossing the picket or otherwise increase pressure on the employer. As such, it is necessary to extend the protection afforded to trade unionists beyond internal union communication, to include public critique of the employer. Some public disclosure might be necessary to demonstrate the contestable nature of business practices.[22] This enhances worker participation, because workers might need access to external sources of information they can only get by discussing internal business affairs publicly. However, this suggests that the greater the opportunity for participation within the firm (the more democratic the workplace is), the more we might lean towards restricting disclosure that undermines business practices, because these have been agreed with workers already. Thereby undemocratic employers lose their privilege against public criticism by their workers; meanwhile, irresponsible, unrepresentative or badly-run trade unions lose their privilege to determine what counts as acceptable criticism. Non-unionised workers run the

union capacity' – it should be up to the union disciplinary process in the first instance to determine how closely-related to the productive process a union official's speech needs to be for him to be speaking in that capacity. Again, only in cases where the union internal processes are obviously inadequate should the employer be entitled to levy sanction – even if the employer disagrees with the outcome.

[22] We should adopt a generous interpretation of what counts as criticism of the employer that is worth protecting on the grounds that it contributes to decision-making processes. At first glance, it seems as if cases like *Crisp v Apple Retail* [2011] UKET/1500258/2011, where a salesperson was dismissed for posting on social media that the phones his employer produced were of poor quality, do not merit protection – the employer's interest in not having his business undermined (particularly because criticism of a product is likely to be taken all the more seriously by customers when it comes from an employee of the company who makes it) seems much stronger than the value of the worker's speech. However, criticism of a product could just as easily be a way to put pressure on a business to arrest a slide in product standards, which is obviously part of productive decision-making.

risk that the employer has more latitude to determine whether the criticism impairs working relationships, and are thus encouraged to organise to gain greater protection.

Diversity

Estlund has demonstrated that workplaces are frequently the most diverse places where adults socialise, and how socialising in diverse environments is generally good for democracy.[23] Of course, we have discrimination laws that tend to foster at least some diversity of identity or certain personal characteristics. It is not seriously in dispute that constitutional labour law does and should protect against discrimination on the standard set of protected grounds: race, sex, religion, sexual orientation, *etc*; although this is not dealt with exhaustively in this thesis. Various authors have justified this on the basis of social inclusion[24] and distribution of opportunities.[25] Foran has recently argued convincingly that what matters is that the protected characteristics be both 'morally irrelevant' and 'socially-salient', in that there is a (socially-contingent) history of persistent 'inequality-laden attitudes' in respect of people who share a particular characteristic.[26] These are certainly valuable perspectives that go some way to justifying the protection of workers from discrimination on the grounds of certain personal characteristics. They do not necessarily tell us why diversity demands the protection of civil liberties as well as non-discrimination – although as we will see, sometimes the civil liberties question is treated as an example of (usually indirect) discrimination, such as on the ground of religion.[27]

It was suggested above that democracy benefits from citizens socialising in diverse environments. There are two reasons for this, both of which lead us towards also protecting the exercise of civil liberties. First, daily interactions with fellow citizens unlike oneself in some socially-salient respect under the 'norm of civility' that pervades the workplace is

[23] Cynthia Estlund, *Working Together* (Oxford University Press 2003).
[24] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) Modern Law Review 16.
[25] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015); Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018).
[26] Michael P Foran, 'Grounding Unlawful Discrimination' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958401> accessed 22 November 2021.
[27] For a critical discussion of this approach, see Sharon Cowan and Sean Morris, 'Should "Gender Critical" Views about Trans People Be Protected as Philosophical Beliefs in the Workplace? Lessons for the Future from *Forstater*, *Mackereth* and *Higgs*' (2022) 51(1) Industrial Law Journal 1. As will become apparent, Cowan and Morris' approach is not consistent with the theory developed below of how constitutional labour law should apply in this area. However, this thesis will not engage directly with their arguments, as their article is focused on specific cases from the UK and the legal framework in that jurisdiction.

likely to reduce fear of or prejudice against 'the other', which makes it easier to participate in a political community with those 'others'.[28] Second, these social interactions with 'the other' lead to a sharing of differing experiences and views on social and political issues, and a drawing of attention to issues that need to be addressed politically, that would not otherwise occur.[29]

As regards the first, it is surely the case that democracy is damaged just as much by unfamiliarity with those of other *beliefs* as it of those with other *characteristics*. There is evidence that political polarisation and partisanship, and distrust of people with alternative lifestyles or values, is doing serious harm to some democracies.[30] Some legal systems prohibit discrimination on the grounds of political beliefs or activities as a characteristic,[31] which may well be a valid way to pursue the value at stake here, but clearly what we are really looking for is a prohibition (however framed) on employers enforcing ideological conformity among their workforce, as well as identitarian uniformity.

As regards the second, this benefit of identitarian diversity is premised on the assumption that identity is a good proxy for experiences and beliefs. This may very well be the case: it is certainly likely that an immigrant has a certain set of experiences of and views about immigration that it would be valuable for non-immigrants to be exposed to in the course of social interaction; that a woman has a certain set of experiences of and views about gender inequality that it would be valuable for men to be exposed to, *etc*. But one's beliefs, although liable to be shaped by one's 'lived experience', do not necessarily correspond to it: partly because individuals can draw various lessons from similar lived experiences, but also because one's experience includes one's prior socialisation – including at, for example, previous jobs. It is particularly difficult to reduce beliefs about political systems, or issues of which few people ever have specific personal experience, to the sort of identitarian characteristics that are typically protected by anti-discrimination law; as such, these are poor proxies for diversity of moral or political belief.

[28] Cynthia Estlund, *Working Together* (Oxford University Press 2003) 24.
[29] Cynthia Estlund, *Working Together* (Oxford University Press 2003) generally, and in particular ch 6.
[30] Amy Chua, *Political Tribes* (Penguin Random House 2018); Milan W Svolik, 'Polarization versus Democracy' (2019) 30(3) Journal of Democracy 20.
[31] For example in Northern Ireland: Fair Employment and Treatment (Northern Ireland) Order 1998 (Order-in-Council no 3162/1998). And, of course, it should be observed that something like religion refers to both a characteristic and a (set of) belief(s) – more on this in Chapter 10.

It is also important to recognise that the exchange works both ways: yes, 'in-groups' can benefit from more empathy for 'out-groups' and become more informed about their perspectives on social issues, but it is equally true that to the extent we would prefer some 'out-groups' to adjust their beliefs or lifestyles towards the mainstream, socialisation at work has benefits there too. The sort of social and economic ostracism that comes from dismissing people for their political or religious beliefs is less likely to change minds than inclusive sharing of experiences and sympathetic exchange of views.[32]. Strossen refers to this as 'inter-group contact theory', arguing it is the 'most effective way' to combat prejudice,[33] more so than if we fire everyone with views we may not like, and thereby reduce their exposure to diverse environments. What is true in respect of colleagues is also true for exposure of customers to workers, and *vice versa*.[34]

Just as we saw in the previous section how criticism of one's employer may have more profound meaning than initially appears, we should be similarly slow to find that an employer's policies on, for example, dress does not suppress important kinds of diversity in the workplace. First, as Waldron has pointed out, having control exercised over one's more quotidian decisions and actions can be even *more* demeaning than conflict over more obviously significant issues.[35] But apart from that, while dress codes have disproportionate impacts on members of certain religious groups, the principle is broader:

[32] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) 8, 34ff, 139, 149.
[33] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) 177. A similar logic can be applied to practices or beliefs we might not necessarily consider prejudicial, but which some people nonetheless wish were eliminated from society. An example of such an argument is Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal Stat*e (Hart Publishing 2019) ch 7, 120ff, who believe the practice by some Muslim women of wearing veils is demeaning to women and should be prohibited from the workplace. However, there is evidence that even in pursuit of that goal, such a prohibition is counter-productive: Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 56ff, 85, 114-5 shows that in fact, prohibiting such religious symbols merely drives the adherents out of public life, reducing their opportunities for socialisation with more liberal colleagues, customers, *etc* and reducing the prospects of them changing their convictions. See also Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 85; Richard Moon, 'Conscience in the Image of Religion' in Adenitire, ch 5, 81; John Adenitire, 'Who Should Give Effect to Conscientious Exemptions? The Case for Institutional Synergy' in the same volume, ch 11, 228.
[34] Lorraine Ryan and Thomas Turner, 'Does where you work influence your political beliefs?' *RTÉ* (Dublin, 22 March 2021).
[35] 'As every torturer knows'; see Jeremy Waldron, 'Homelessness and the issue of freedom' in *Liberal Rights* (Cambridge University Press 1993) ch 13.

> [Dress codes] denigrate cultural and religious diversity and enforce conformity to white, heterosexual, Christian images of beauty and proper grooming [and] both exploit and repress female sexuality and punish women who depart from (largely) male-created expectations about proper female behaviour and roles.[36]

Dress codes and other behavioural standards of 'professionalism' often reflect prejudice against certain social groups and certain kinds of *lifestyle*.[37] To the extent individuals lifestyle choices are reflective of their fundamental beliefs and values, we should be suspicious of employers' efforts to produce conformity among their workforce, even where this does not amount to discrimination on the grounds of a specific protected characteristic.

Moral independence

So far we have stressed the importance of workers' ability to contest decisions made about them and views put forward into the public realm that may influence those decisions, be it in the workplace or the political process writ large. We have also recognised that for this contestation to be worthwhile, there needs to be a diversity of both lived experiences and viewpoints available for workers to share through the process of socialisation. In a democracy, citizens' beliefs are obviously *interdependent*, and shaped by our interactions with fellow citizens, including (according to Estlund, especially) in the workplace.

However, the flip side of acknowledging the interdependence of beliefs and their ability to be shaped by socialisation, is that we must protect that process of formation from undue influence or control.[38] Chapter 5 explained how the labour relationship poses a very specific threat that employers will use their economic power and the hierarchical nature of the workplace to corral their workers into a 'retinue':[39]

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[36] Karl E Klare, 'Power/Dressing: Regulation of Employee Appearance' (1992) 26 New England Law Review 1395, 1398, cited in Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (Cambridge University Press 2012) 443. Of course, we should be clear that lots of people (it seems from a survey of the case law, mostly women) face barriers to manifesting their Christian faith through dress and symbols too.

[37] Vandana Nath, S Bach and Graeme Lockwood, 'Dress codes and appearance at work: body supplements, body modification and aesthetic labour' (ACAS 2016).

[38] For a general discussion, see Neil Richards, *Intellectual Privacy* (Oxford University Press 2015).

[39] Desmond S King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision' (1988) 18(4) British Journal of Political Science 415, 427. Edward T Walker and Christopher M Rea, 'The Political Mobilization of Firms and Industries' (2014) 40 Annual Review of Sociology 281 have discussed the phenomenon of corporate political mobilisation that would only be exaggerated by influencing the political beliefs and activities of workers.

> [A]n employer is using its economic power over its employees as leverage to obtain greater power in the political sphere. Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse, in which employers' voices are amplified and workers' are squelched.[40]

One's political views are 'downstream' from one's broader social and moral views or values. Therefore, the preservation of political independence requires a degree of protection for independent moral formation. Of course, humans as social animals cannot help but be influenced in our moral, social and ultimately political views by those with whom we associate, including in the workplace. In part, that is why we value diversity, as explored above. However, this sort of organic moral formation should be distinguished from what we might call 'moral tutelage', the idea that a hierarchical management structure can take it upon itself to direct the formation, expression and exchange of individuals' moral, social and political views.[41]

Obviously, one's moral commitments may derive from religious adherence, or form part of another overarching philosophical creed; or they may be more *ad hoc*, albeit no less deeply-held for that. In order to participate meaningfully in political and social life as a citizen, one needs to be able to bring one's own judgment, values and beliefs to bear on political and social questions, to guide one's expressions and actions. Implicitly, in a pluralist liberal democracy, citizens will hold a wide variety of value- and belief-systems, which are formed by their own 'lived experiences' and the influence of their communities – including their affiliations to religious or political organisations.[42] This ordinary process of human socialisation and development, necessary to build citizens, should be shielded from pressure from those in positions of power.[43] The development of citizenship and the ability of citizens to function in a pluralist liberal democracy is impeded by moral tutelage, especially when carried out by those with more wealth and power than the average citizen, which includes employers. We can reasonably object to the imposition of a particular moral

[40] Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 256.
[41] Neil Richards, *Intellectual Privacy* (Oxford University Press 2015).
[42] Richard Moon, 'Conscience in the Image of Religion' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 5, 78; John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13.
[43] George Letsas, 'Accommodating What Needn't Be Special' (2016) 10 Law & Ethics of Human Rights 319, 328.

viewpoint by an employer, or the requirement of adherence to certain moral norms as a condition of employment, without necessarily disagreeing with the norm itself.[44] The prospect of an employer seeking to influence workers' political, social and moral views is particularly unappealing for the following reasons: first, they bring their power within the hierarchical employment relationship to bear.[45] Second, workers rely on employment for material provision, and are thus in a position of dependency on the employer, as we saw in Chapter 3.[46] We will see in the next sub-section reasons to be uneasy about requiring people to conform to moral or political precepts as a condition for material gain, particularly when they are in severe need of it.

Of course, some employers do explicitly pursue 'moral missions' – particularly religious organisations, political parties and NGOs. But generally workers do not look to their employers for moral and political guidance, nor seek opportunities for moral development in employment;[47] they are simply looking for 'bread and roses'. Unfortunately, space precludes examination of the special position of 'ethos employers' in this thesis, despite fertile jurisprudence from the ECtHR in this area.[48]

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[44] For a contrary viewpoint, Aileen McColgan, 'Class Wars? Religion and (In)Equality in the Workplace' (2009) 38(1) Industrial Law Journal 1, 14 suggests we should be concerned that 'the [genuine occupational requirement] defence would not apply to an employer whose objection to employing acknowledged white supremacists, or dyed-in-the-wool sexists, or homophobes was a matter of principle unrelated to the jobs for which they are employed.' McColgan seems therefore to approve of moral tutelage on the part of employers, even where the morality of their workers has no bearing on their job performance. The argument that workers with bigoted views are 'likely to trigger harassment complaints from other members of staff or (in a decision-making role) to act in a prejudicial way or at least be suspected of so doing' is not without merit; however, nothing in this chapter suggests that a worker who actually harasses or discriminates against a colleague should not be disciplined, as will become clear below. That is entirely different from the person who might hold bigoted views but does not act on them in the workplace: such a person might be forced to abandon his integrity, but that is not sufficient to outweigh our concern for diversity and equality in these circumstances. In any event, not being racist, sexist or homophobic might well be a genuine occupational requirement for someone whose job involves making decisions about other workers without prejudice.

[45] Of course, political and religious leaders are also in positions of authority, and we do not have the same objection to their influence on moral formation. But partly, that is because we expect them to play that role – indeed, a religious leader who does not seek to influence people's moral development would be highly unusual. Many people seek out religion *specifically* so that its institutional hierarchy, where it exists, will guide and assist in their moral development. That is not, by and large, why people seek out employment.

[46] This can be true of religious organisations too (for example, where people depend on charity), but is less likely in developed welfare states. Even where religious organisations make receipt of charity dependent on conformity to religious tenets, and this has a widespread effect, it still seems less objectionable than the employment context – again because religious organisations hold themselves out as being engaged in proselytising missions.

[47] For a contrary view, see Frank Cranmer, 'Can Secular Non-Natural Persons be Said to Have a Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 12.

[48] See, for example, *Siebenhaar v Germany* Application no 18136/02; *Obst v Germany* Application no 425/03; *Schüth v Germany* Application no 1620/03; *Fernández Martínez v Spain* Application no 56030/07. For a more general discussion, see Paul Billingham, 'Exemptions for Religious Groups and the Problem of Internal

In most Western liberal democracies, it is rare that one's employer or colleagues would try to formally convert a worker to or from a particular religion or philosophy;[49] more common is evidence of employers requiring workers to abandon certain tenets of their religion, like particular dress or symbols.[50] However, there is ample evidence of 'moral tutelage' in a broader sense: we see dismissals or other sanctions for petty criminality in one's private life,[51] drug use, sexual misconduct, the profession of objectionable views like racism or other forms of bigotry, distasteful or controversial actions or expressions,[52] on the basis of psychological profiling or medical examination, *etc*. We also see the adoption of moral, social or political 'charters' by corporations, purporting to express the company's 'values', according to a certain moral creed held by management.[53] In other circumstances, we see requirements that workers disclose certain information, and monitoring by employers of workers in such a way as to uncover such information, that leads to 'strategic adaptation' by workers to avoid discovery or sanction.[54]

It should be observed that, in general, these kinds of 'moral failings' do not actually impact one's work. That will not always the case – sometimes employers might be suspicious of potential impacts on their business (*eg* theft outside work might suggest theft at work, or customers might not like dealing with a worker in a *hijab* and will take their custom elsewhere[55]), or sometimes the worker is a role model for children or needs a level of trust

Dissent' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 4; Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 152ff.

[49] This might be more commonplace where there are certain traditions of evangelical Christianity. For reasons that will be explained below, employers (and the state) have a legitimate interest in restraining outright proselytism in the workplace. That in itself may be justified by reference to the need to protect *other* workers' moral independence (particularly where there is a hierarchical relationship). Of course, we should be careful to draw a line between merely 'bearing witness' to one's faith, which may include explaining its tenets to interested colleagues in the course of ordinary conversation, and restrainable proselytism. For more, see Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 29-30.

[50] See Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017). Alidadi's is a worthy and, for this thesis, useful work – some of what follows here and in the next chapter draws on it. Regrettably it was not possible for the author to obtain a copy that was suitable for pinpoint citation. As such, references will be made below to general points made by Alidadi, without very detailed reliance.

[51] *X v Y* [2004] EWCA Civ 662.

[52] Virginia Mantouvalou, '"I Lost my Job Over a Facebook Post – Was that Fair?" Discipline and Dismissal for Social Media Activity' (2018) University College London Working Paper Series, no 2/2018.

[53] Edward T Walker and Christopher M Rea, 'The Political Mobilization of Firms and Industries' (2014) 40 Annual Review of Sociology 281.

[54] David Enoch, 'False Consciousness for Liberals, Part I: Consent, Autonomy, and Adaptive Preferences' (2020) 129 The Philosophical Review 159.

[55] As was the case in C-118/15 *Bougnaoui*.

from vulnerable clients.[56] We should also distinguish a case where someone has, for example, taken drugs at work or committed sexual misconduct against a colleague, which would imperil the safety and well-being of others. Those actual or potential conflicts need to be mediated by reference to the values that underpin the existence of the civil liberties in the first place (meaningful democratic participation), and we will return to some of these specific issues in the next chapter. Readers will be familiar from anti-discrimination law with the idea of a 'genuine occupational requirement' as a defence to a claim of direct discrimination, and the prospect of justifying indirect discrimination that is not disproportionate.[57] Facially neutral rules that in practice burden one group or category of workers (that is protected by the recognised grounds of discrimination) more heavily than others can only be justified if the rule reflects a genuine requirement of the job (and is not disproportionate to the meeting of that requirement). We should resist moral tutelage on the same basis. Indeed, some of what we are calling 'moral tutelage' might well be actionable as indirect discrimination: requiring a Muslim woman to remove her headscarf, for example.[58]

These values suggest that the law should lean towards the protection of independent moral formation, and against anything that smacks of moral tutelage. In general, we should be sceptical of claims that a particular 'vice' conflicts with the requirements of a job, or that a worker's moral, social or political views are incompatible with his continued employment. We should generally reject the employer's reputation or corporate image as a purported justification for moral tutelage.[59] A much better justification, as suggested above, is the safety of customers or colleagues (which also serves the value of diversity in potentially making vulnerable groups more welcome), with two caveats: just as was the case in an

[56] Arguments advanced to varying effect in *Vogt v Germany* Application no 17851/91; *Redfearn v United Kingdom* Application no 47335/06; *Ebrahimian v France* Application no 64864/11; *Suerot v France* Application no 57383/00, among others.

[57] See further the discussion in Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing 2018). See also Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 9; Lucy Vickers, 'Conscientious Objections in Employment: Is a Duty of Reasonable Accommodation the Answer?' in the same volume, ch 10.

[58] Lucy Vickers, 'Conscientious Objections in Employment: Is a Duty of Reasonable Accommodation the Answer?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 10, 201 argues there are good reasons to prefer an accommodation approach to that of indirect discrimination – because workers are reluctant to accuse their employer of discrimination, employers are more likely tor eact defensively, and an accommodation framework is more likely to lead to dialogue.

[59] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1(2015) 44(1) Industrial Law Journal 1.

earlier section with respect to dismissal for criticism being an excuse to get rid of 'troublemakers', we should approach employer claims of harm to customers or colleagues with scepticism;[60] and we may need to build in some tolerance for the effects of moral error (which is implicit anywhere there is contestation about anything). These conditions serve the equally important values of contestation and diversity, discussed above. We may need to see the interaction of these values worked out in the case law, guided by the values we are putting forth here and a recognition that *moral tutelage is itself a harm* (quite independently of whether we agree or not with the moral view that is being 'tutored').[61] For example, we should recognise that where the decision to adopt a certain set of moral constraints on workers is one in which the workforce has had the opportunity to meaningfully participate, this might be a valuable expression of moral, social and political views by the workers, and a valuable kind of participation in public life. Again, we see the potential for autocratic employers to lose the legitimacy to influence their workers in this way, while more democratic workplaces are entitled to more leeway. Moral tutelage is inherently hierarchical and condescending: the more egalitarian the workplace community, the less that rules on behaviour will manifest as moral tutelage.

Integrity

Foolish, bizarre, upsetting or offensive as a worker's beliefs might sometimes be to managers, colleagues or customers, they should only be grounds for dismissal in exceptional circumstances. Ordinarily, employers should be obliged to accommodate their workers' independent moral formation and political activities, and contestation of their own decisions or behaviour, across a diverse spectrum of the society in which they operate. The alternative, as suggested above, is a process of 'strategic adaptation',[62] where citizens will compromise on their own beliefs and cultural backgrounds, deferring to the preferences of their present employer or future employers, in order to earn a living. This, as we have seen,

[60] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) 47, 109ff, ch 6 generally; Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 9, 175; John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13, 280ff.
[61] John Adenitire, 'Conscientious Exemptions in a Liberal State' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 13, 247, 251.
[62] See further Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).

not only disempowers workers in the public sphere, but increases the already greater power of wealthy employers.

Strategic adaptation of this kind also damages a final value of democratic citizenship that we should discuss: integrity.[63] By forcing people to choose between their moral, philosophical, religious or political commitments and their job, employers are inviting workers to, in essence, sell out. In Ireland we have a phrase, 'taking the soup', which originated in the alleged practice of charities associated with Protestant churches offering aid to the poor on the condition that they abandoned their Catholic faith.[64] Even after the rise of a more secular Ireland, 'taking the soup' remains a potent insult towards anyone who is seen to 'sell out' their beliefs or community allegiances for material gain. In a modern context, it becomes very difficult for citizens to advance particular causes in the public realm if their fellow citizens can point to behaviour at work that contradicts those beliefs.[65] Three different risks may arise: (a) one's actual job is to do something one disagrees with (*eg* a marriage registrar who does not want to marry gay couples)[66]; (b) the business for which one works acts in a way that one disagrees with, although one's own job does not involve anything objectionable (*eg* someone with strong environmentalist

[63] Damien Cox, Marguerite La Caze and Michael Levine, 'Integrity' in *Stanford Encyclopaedia of Philosophy* (rev 2021) <https://plato.stanford.edu/archives/fall2021/entries/integrity/> accessed 25 November 2021; see also Lynne McFall, 'Integrity' (1987) 98 Ethics 5. For more on integrity in the context of employment and other cases of conscientious objection or exemption, see: Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 143; John Corvino, 'Is Religion Special? Exemptions, Conscience and the Culture Wars' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 2, 14, 23; Richard Moon, 'Conscience in the Image of Religion' in the same volume, ch 5 81; Ian Leigh, 'The Courts and Conscience Claims' in the same volume, ch 6, 92; Mary Neal, 'Conscientious Objection, "Proper Medical Treatment" and Professionalism: The Limits of Accommodation for Conscience in Healthcare' in the same volume, ch 8; John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13, 253; François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 323.

[64] The extent to which this actually happened is disputed, but it has become ingrained as a folk memory of *An Gorta Mór* (the Great Famine of the 1840s, where potato blight wiped out the crops on which the vast majority of the population depended for sustenance, leading to at least a million deaths and mass emigration). For more, see Desmond Bowen, *Souperism: Myth or Reality* (Mercier Press 1970); Irene Whelan, 'The Stigma of Souperism' in Cathal Poirtéir (ed), *The Great Irish Famine* (Mercier Press 1995); Susan Campbell Bartoletti, *Black Potatoes: The Story of the Great Irish Famine* (Houghton Mifflin Harcourt 2014); Patricia Byrne, *The Preacher and the Prelate - The Achill Mission Colony and the Battle for Souls in Famine Ireland* (Merrion Press 2018).

[65] Moreover, a loss of integrity generates psychological harm: Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 9, 175; John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13, 253. For a contrary view on the relationship between integrity and citizenship, see John Corvino, 'Is Religion Special? Exemptions, Conscience and the Culture Wars' in the same volume, ch 2, 23ff.

[66] *Eweida and others v United Kingdom* Applications nos 48420/10, 59842/10, 51671/10 and 36516/10.

beliefs who works as an office cleaner for an oil company); (c) one is obliged to act in a way contrary to one's values during the course of one's job, but not strictly in performance of the work task (*eg* a teacher told to remove a headscarf)[67]. We will see later that a different approach may be justified in respect of each of these situations.

We saw in earlier chapters how one's ability to participate effectively in public life is conditioned by the quality of one's interpersonal relationships with others in society. In particular, we observed that domination entails a lack of both self-regard and social esteem – so too does social perception of hypocrisy or a lack of integrity, which makes it much more difficult to advance arguments one believes in. It is harder to advance a particular moral, social or political belief in a way that is likely to convince others, and harder to be taken seriously in one's advocacy of a particular belief (whether by those one is trying to convince, or one's fellow-travellers in a community of advocates), when one is publicly identifiable as acting in a way that is contrary to that belief. Political science literature demonstrates citizens' disapproval of hypocrisy, particularly where financial gain is involved.[68] Employers often worry that the political or other public activities and statements of people who happen to work for them will damage the reputation of their business.[69] They fear a sort of 'guilt by association' with the objectionable views of their workers. As will be seen in the next chapter, avoiding this reputational harm is recognised time and again in the case law as a legitimate aim of management in sanctioning workers for political activity and expression. However, no credence is given in the case law for the effect on the reputation of a *worker* where he is seen to 'take the soup', or compromise on his beliefs to get or keep a job. In some cases, courts rely on the 'ultimate guarantee' of being able to quit one's job. Certainly, quitting a job and risking poverty to avoid compromising one's beliefs demonstrates serious personal integrity, but if the law allows workers to be dismissed in such circumstances, then there is no guarantee one will ever find another job where living up to one's beliefs is possible.

[67] *Dahlab v Switzerland* (dec) Application no 42393/98.
[68] See for example, Monika L McDermott, Douglas Schwartz, and Sebastian Vallejo, 'Talking the Talk but Not Walking the Walk: Public Reactions to Hypocrisy in Political Scandal' (2015) American Politics Research 1.
[69] For example, *Predota v Austria* (dec) Application no 28962/95; *Pay v United Kingdom* (dec) Application no 32792/05; *Redfearn v United Kingdom* Application no 47335/06; *Szima v Hungary* Application no 29723/11.

In light of what we said earlier about inequality of bargaining power and material dependence of workers on their employers, it is not necessarily unreasonable for people to compromise on their beliefs and values in pursuit of employment. That is a trade off many, perhaps even most, people will make, in big ways and small. To a certain extent, it is entirely healthy that in a pluralist, liberal democracy, people will temper their convictions and adjust how they manifest them, in the interest of 'living together'[70] as a community, and obedience to commonly-agreed laws.[71] The problem is that, in a capitalist labour market, these compromises and adjustments will systemically favour the interests and beliefs of employers. That is not to say that employers will necessarily be acting nefariously in shaping a 'retinue': sometimes, they attempt to impose moral order on their workplace out of concern for customers or other workers. The problem is that is not their proper role in a democratic society. Democratic citizens are entitled to their own process of moral formation; they should adjust their beliefs and behaviour in the interests of 'living together' alongside their *concitoyen* colleagues, but only *in extremis* should employers be entitled to compel them. Without constitutional labour law protecting civil liberties, those who are unwilling to compromise their beliefs in ways employers demand will be ostracised from the workplace, and thus lose out on both opportunities for socialisation (whether to influence others in their beliefs or for their own moral formation) and the material conditions supportive of their participation in society.[72] Allowing employers to hold workers to particular moral standards, where these have nothing to do with performance of the job but reflect either moral tutelage or a fear of 'guilt by association', creates significant disincentives to personal integrity. If integrity is one of the values that we want to inculcate in citizens of a democracy, and selling out or hypocrisy something we want to discourage, then this seems like a bad system of incentives.[73] The law should instead shield workers

[70] To borrow a loaded phrase from the case law on religious dress: see, for example *SAS v France* Application no 43835. For discussion, see Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 80.

[71] Richard Moon, 'Conscience in the Image of Religion' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 2, 14 says we do not want religion or conscience to be 'a kind of get-out-of-the-law-free card'. There is clearly a rule of law justification for declining to grant an exemption on the basis of conscientious objection. However, as has been mentioned at various points in this chapter, it is harder for undemocratic employers to claim this rationale – it is more likely to be available to democratic workplaces where the workers can agree collectively what norms should bind them all and which objections to facilitate.

[72] See Chapters 3 and 5.

[73] Reed T Shafer-Ray, 'The Tragedy of Selling Out' *The Harvard Crimson* (Cambridge, 9 November 2017); Lily Zheng and Inge Hansen, *The Ethical Sellout: Maintaining Your Integrity in the Age of Compromise* (Berrett-Koehler 2019); Lily Zheng, 'We Sell Out in Little Ways All the Time: Why Don't We Talk About It More?' *Zora* (5 December 2019) <https://zora.medium.com/we-sell-out-in-little-ways-all-the-time-why-dont-we-talk-more-about-it-a9f44be34720> accessed 18 August 2022.

from the sort of pressure from employers that discourages them from having integrity. Having due regard to the limits of human fortitude, we should reduce the extent to which workers are forced to choose between values and jobs.

Conclusion

This chapter shows the complementarity of the twin values of citizenship, participation and political independence. The former is meaningless without the latter; the latter pointless without the opportunity for the former. It also shows why constitutional labour law should embrace both 'traditional' concerns of labour law in the form of collective representation at enterprise and sectoral levels, and protections for workers' civil liberties. The key insight from this chapter is that we need a values-based theory for making the adjustments necessary for these rights to apply in the workplace context. This chapter has supplied contestation, diversity, moral independence and integrity as values for interpretation and decision-making in a constitutional labour law based on citizenship. The next chapter will elaborate on *how* constitutional labour law should deal with civil liberties issues, through an analysis of case law from the European Court of Human Rights. As will be shown, civil liberties issues tend to be more fraught than other concerns of labour law, involving more difficult balancing of relevant rights and interests, meaning the values elaborated in this chapter are vital to inform those adjustments.

CHAPTER 10:
EUROPE: CIVIL LIBERTIES FOR WORKERS

Introduction[1]

We have just seen four reasons for constitutional labour law to protect workers' civil liberties, corresponding to four values that should inform the development of constitutional labour law in this context: contestation, diversity, moral independence and integrity. Together, these justify rights of workers against employers to freedom of expression, the free practice of religion or philosophical belief, privacy and non-discrimination. This chapter will use case law from the European Court of Human Rights to illustrate how some of these issues arise in practice, and how to balance relevant rights and interests.[2] The contents of this chapter could fill a thesis on their own,[3] and several authors have examined the jurisprudence presented here in greater detail and more extensively.[4] This chapter will confine itself to highlighting some of the most important cases that illustrate the sorts of civil liberties issues that crop up in constitutional labour law, to inform our theory.

The insights on how courts have dealt with the issues of waiver and adaptation of the rights (which plague this area of constitutional labour law in particular) to be considered here will be useful in setting out how courts should intervene in the labour relationship on the basis of constitutional norms in general – that is, how courts should apply constitutional labour law.

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[1] This chapter draws on parts of a paper presented at 'The Dusts of Time? Towards a 21st-Century Constitutionalism' conference (European University Institute, Florence, 7 October 2021). Thanks to Hilary Hogan and the other participants at the conference for their comments and discussion. I also benefitted from discussions on the theme of this chapter with Hugh Collins, Roderick Bagshaw and Sandra Fredman during the Bachelor of Civil Law programme at the University of Oxford, 2018-19.

[2] Recall that we are to discuss issues thematically, rather than broken down by respective Convention Article. The most commonly invoked are: Article 8 (private and family life); Article 9 (freedom of conscience and free practice of religion); Article 10 (freedom of expression); Article 11 (freedom of association); and Article 14 (protection against discrimination on various grounds in the enjoyment of other rights). There will be a few supplementary cases from the Court of Justice of the European Union, to flesh out particular issues.

[3] And very nearly did. For just such a treatment, see Philippa Collins, 'Putting Human Rights to Work' (DPhil thesis, University of Oxford 2018).

[4] See: John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001); Hugh Collins, *Employment Law* (2nd edn, Oxford University Press 2010) 210ff; Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013); Elena Sychenko, *Individual Labour Rights as Human Rights* (Kluwer Law 2017); Philippa Collins, 'Square Peg *versus* a Round Hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Journal 199.

Civil liberties case law: values in practice

As stated earlier, there is a significant body of case law on the subject of civil liberties for workers. It will not be possible to examine this in exhaustive detail here. Rather, a selection of discrete issues has been made that offer opportunities to examine the normative values underlying the relevant cases and suggest how our values of contestation, diversity, moral independence and integrity should be brought to bear. The decision has been made to group these by issue, rather than corresponding to the four values set out above. This is because each case may and often does invoke, or require the balancing of, more than one value – as well as various employer interests. The cases examined in this chapter come from the European Court of Human Rights and the Court of Justice of the European Union. As explained in the introduction to this Part, Chapters 7 and 8 primarily drew on material from the Irish Superior Courts to explain the value of participation, and this chapter will rely on European cases to explain political independence. The justification for this was given in Chapter 1: in short, a dearth of Irish material on these topics, and second, in order to demonstrate that this is a theoretical project within a tradition of constitutional theory that extends far beyond this island, and as such can be used to inform constitutional labour law in various jurisdictions.

The following issues have been chosen for examination: workers' political activity; criticism of the employer; and religious accommodation. Again it must be stressed that what follows does not aim at comprehensiveness, but rather uses the facts of cases and the reasoning offered by judges selectively to illustrate normative and theoretical issues at play.

Workers' political activity

The area of cases most closely related to our theory of citizenship as a basis for protecting civil liberties in the workplace is that which concerns workers' political activity. Sometimes this corresponds to formalised 'big-P' political activity – membership of a party, running for election, *etc*; sometimes it will refer to public comments that the worker conceives of as explicitly political in nature, albeit not as part of a formal electoral process – the tale of Ms Gibbins from Chapter 1 is a good example.[5] Often, however, we are talking about *ad*

[5] *Gibbins v British Council* [2017] UKET 2200088/2017.

hoc comments on social issues or current affairs which are not self-consciously political in nature, but nonetheless have a political dimension which is often overlooked by the courts.[6] We should also be aware that sometimes the activity to which the employer objects has taken place before the worker took up employment, but has only come to light much later.

Generally speaking, employers in these cases have one or more of three concerns: one, there will be adverse publicity that will (purportedly) damage the employer's reputation; two, colleagues or customers will be offended or upset by the worker's comments or activity; three, the nature of the activity suggests the employer cannot trust the worker with an important role. In a smaller number of cases, there is the risk that the workers' beliefs or comments undermine the credibility of the organisation. Generally, these cases involve 'ethos employers', which we have deliberately excluded from this thesis. However, it is important to examine a case which happens to involve an ethos employer, because it illustrates broader issues that are important for other cases in this area.

In *Rommelfanger v Germany*,[7] the applicant was a doctor at a hospital owned and operated by the Roman Catholic Church. He signed his name to an open letter that was supportive of a reform to the law to increase access to abortion, and was dismissed. The European Commission for Human Rights found the case inadmissible. It held: (a) Convention rights can, in principle, be limited by contract; (b) that there exists an 'irreducible minimum' (to use the phrasing adopted much later in *Bărbulescu v Romania*)[8] of freedom of expression that cannot be waived by employment contract; (c) that the kind of restrictions on rights an employer can demand of its workers in the name of 'loyalty' depends on the nature of the employer and its activities – with greater scope available to 'an organisation based on certain convictions and value judgments'; and (d) any demands of loyalty that conflict with

[6] We should also observe that sometimes non-political 'controversies' can spark an equivalent 'moral panic' on the part of an employer, which is often couched in the same terms as will be explained arise in political cases: reputation, harm to customers or colleagues, and trustworthiness. In *Özpınar v Turkey* Application no 20999/04, the applicant was a judge who had casual sexual relationships and affairs with a prominent lawyer and various local politicians, which led to allegations that she gave favourable treatment to certain people in cases before her. There were also allegations that she dressed inappropriately for work, but overall the investigation into her focused on her sex life. She was dismissed, but the ECtHR found a violation of Article 8. In *Pay v United Kingdom* (dec) Application no 32792/05, a probation officer who worked with sex offenders was dismissed after an anonymous tip-off to his employer that in his spare time, he ran a business supplying BDSM gear and took part in male-dominant BDSM shows in clubs that were advertised online. The ECtHR held the case inadmissible.

[7] Application no 12242/86.

[8] Application no 61496/08.

a worker's freedom of expression must be reasonable, having regard to the importance of the issue to the employer's 'convictions and value judgments', its activities, and the particular job occupied by the worker.[9] The Commission held the demands of the employer were reasonable here.

So we see that waiver can justify limitations on workers' rights in the eyes of the ECtHR, but only to a certain extent. We will see in other cases, the Court has prevaricated on quite how much; sometimes, it has taken the view that workers can always get another job if they do not agree to the requirements of this employment contract. Generally, the Court wants another justification, such as those reasons given above why employers seek to restrict the workers' expression. In practice, the first and second categories often overlap, and cases arise in which the employer purports to rely on both a concern for its reputation *and* for the well-being of its customers or other workers. This makes sense, because often the reason a business' reputation might suffer in these circumstances is the fact that they are seen to allow a risk to the well-being of customers. However, it is clear from the case law that oftentimes the employer relies on a purported concern for customer or colleague welfare when really the concern is reputation.

Two cases demonstrate the overlap. In *Van der Heijden v the Netherlands*,[10] the applicant worked for a charity promoting the integration of immigrants. He was dismissed after the media reported his membership of a political party that was opposed to the immigration of workers from a particular country. The ECtHR held the application under Arts 10 and 11 was inadmissible, on the basis that the employer had a legitimate aim to protect the rights of its clients and its own credibility among the section of the population it aimed to serve.[11] In *Redfearn v United Kingdom*,[12] the applicant was a bus driver who worked in an area that

[9] This was upheld in *Fernández Martínez v Spain* Application no 56030/07, wherein it was stressed that organisational credibility is more important than waiver.
[10] (dec) Application no 11002/84.
[11] See also *Gollnisch v France* (dec) Application no 48135/08, in which the applicant was a university lecturer (and an MEP for a right-wing political party) who made comments at a press conference that led to a criminal conviction for Holocaust denial, and criticised a report about anti-Semitism at his university. He was suspended and docked pay. The ECtHR held his application under Art 10 inadmissible. See further *Kern v Germany* (dec) Application no 26870/04, in which an environmental engineer with a local authority was dismissed after he published, in his capacity as a member of a right-wing political organisation, an article criticising US foreign policy that (he argued) had inspired the terrorist attacks on 11 September 2001, and for a criminal conviction for wearing the symbol of an unconstitutional organisation. The ECtHR held his application under Art 10 inadmissible as the employer was justified in considering that the applicant had insufficient loyalty to the democratic order of the state.
[12] Application no 47335/06.

had a large immigrant and ethnic minority population; he was dismissed after he was elected as a local councillor for a right-wing anti-immigrant political party. The ECtHR found a violation of Article 11, holding that 'a legal system which allows dismissal from employment solely on account of an employee's membership of a political party carries with it the potential for abuse'.[13] The Court held that although in principle it may be justified to dismiss someone on the grounds of their political activity if knowledge of that activity induces anxiety among vulnerable customers,[14] the applicant here was a 'first-class employee' with no complaints made against him for *inter alia* racial harassment of customers.[15] The Court therefore suggested that evidence of harm to customers by the specific actions of the worker would be necessary, and that mere membership of a political party with objectionable views was not enough.[16] By contrast, in *Seurot v France*,[17] the applicant was a teacher who wrote an article in the school newsletter that was critical of Muslim immigrants. He was criminally convicted of incitement to hatred and dismissed. The ECtHR held the application under Art 10 inadmissible, again because his prejudice was deemed to undermine his position as an educator. Here the concern for staff and student welfare seems more to the fore.

In the third category, we find a string of cases from European states that had recently emerged from totalitarian political systems and were fearful of a 'fifth column' of civil servants who may hold political ideologies and allegiances inimical to the modern democratic state. One of these will suffice to illustrate the trend:[18] in *Knauth v Germany*,[19] the applicant had been a nursery school teacher in the former East Germany. Post-reunification, she was hired as a nursery teacher in the public sector, having signed a declaration that she never collaborated with the East German Communist regime. It was subsequently discovered that she had acted as an informant for the Stasi secret police, and she was dismissed. The ECtHR held the application under Art 8 inadmissible, emphasising

[13] Application no 47335/06, [55].
[14] Application no 47335/06, [44].
[15] Application no 47335/06, [45].
[16] It is worth noting that the Court afforded more leeway to the charity in *Van der Heijden* than the bus company in *Redfearn*. This is seemingly because it counts as an 'ethos employer'; again, we are not in a position to examine this issue further here.
[17] (dec) Application no 57383/00.
[18] Other cases include: *Glasenapp v Germany* Application no 9228/80; *Kosiek v Germany* Application no 9704/82; *Rekvényi v Hungary* Application no 25390/94.
[19] (dec) Application no 41111/98.

the ‘exceptional historical context’ and that the applicant had lied to her employer at the time of hiring.

In such cases, the Court will be slow to give private employers the same leeway as the state, presumably on the basis that the stability of the state is not undermined by people with extreme political views or allegiances working in private sector businesses. In *Sidabras and Džiautas v Lithuania*,[20] the applicants had been KGB agents under the former Communist regime in Lithuania. After the fall of Communism, they found work as a tax inspector and public prosecutor, respectively. A subsequent public investigation uncovered their KGB work, and this was recorded in a public register. The applicants were dismissed, and banned by legislation from future employment in a wide range of occupations in both the public and private sectors. They did not challenge their dismissals as a violation of the ECHR, only the prospective bans. The ECtHR found a violation of Article 8 on the basis that including swathes of the private sector was disproportionate. This special position of the state in such cases is reinforced by a series of cases involving judges disciplined for having made extra-curial comments on matters of contemporary political controversy.[21] The ECtHR held the state has greater scope to constrain the political activities of judges, in light of the separation of powers and the rule of law. Clearly, these justifications do not apply in the private sector; nor, as seen in other cases, to all public sector workers.

Even for public employees, there must be a genuinely serious risk to the state: in *İhsan Ay v Turkey*,[22] the applicant was dismissed from his job as a teacher after a security check revealed he had been convicted of disseminating Communist propaganda decades earlier, an offence which had since been repealed and his record expunged. The ECtHR found a violation of Article 8. In *Vogt v Germany*,[23] a secondary school teacher was dismissed when it came to light that she was an active member of the Communist party. The Court distinguished its earlier cases on the basis that the applicant in *Vogt* had already been a member of the civil service when she joined the party, whereas the applicants in the earlier cases had been new entrants[24] (this reasoning was the subject of criticism from the

[20] Applications nos 55480/00 and 59330/00.
[21] See, for example, *Wille v Lichtenstein* Application no 28396/95; *Kudeshkina v Russia* Application no 29492/05; *Baka v Hungary* Application no 20261/12; *Żurek v Poland* Application no 39650/18; *Kövesi v Romania* Application no 3594/19.
[22] Application no 34288/04.
[23] Application no 17851/91.
[24] Application no 17851/91, [44].

minority)[25]. More convincingly, it went on to say that although the state had a legitimate aim in preventing subversion of its institutions by undemocratic political operatives, there was no evidence that the applicant had personally ever done anything that was inimical to national security, and her specific job as a teacher had no national security implications.[26] There was also no evidence she had tried to promote her ideological views to her students[27] – something that will also be relevant for the religious adherence cases considered below. The ECtHR found a violation of Articles 10 and 11.

The contemporary position in Strasbourg therefore appears to be that (a) the state gets more leeway than private businesses to police the political activities of its employees (particularly in 'exceptional historical context[s]'), (b) with an exception available for organisations that clearly pursue a 'moral mission' or advance a political cause whose credibility is at risk; (c) but even the state must show very clear danger to constitutional stability, rather than simply political views the government disagrees with, or (d) an attempt to use a position of public authority to advance a political cause. This is compatible with the theory of citizenship we have espoused in this thesis – and interestingly, inverts the presumption that ran through Chapter 2, that the state should bear greater burdens to respect citizens' rights than private individuals. Although there are examples of private employers relying successfully on the concern about harm to customers or colleagues, these should be viewed sceptically,[28] as in *Redfearn*. Estlund's 'norm of civility' should prevail within the workplace itself (although we will see in the next section circumstances in which greater robustness of discourse should be tolerated), but otherwise workers should both be free to engage in democratic deliberation and be expected to tolerate the opinions of their fellow citizens with ordinary fortitude.

A business should not be entitled to rely on its reputation *per se* – which is to be contrasted with its *credibility*, if it is an organisation that itself advocates a political or moral view as part of the democratic process. The boundary of this exception must be policed very carefully, to avoid the circular logic that a business can adopt some kind of charter of 'values' in order to portray itself as having a moral mission, and thus be entitled to enforce

[25] Application no 17851/91, [7] (dissenting opinion of Judge Jambrek).
[26] Application no 17851/91, [60].
[27] Application no 17851/91, [60].
[28] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1.

those values. This exception should be reserved for organisations who by their very nature make a valuable contribution to democratic pluralism, and pursue their moral / political mission *instead of profit – ie* charitable NGOs and religious organisations. These form a separate category of cases it is not possible to consider in this thesis.

Criticism of the employer

In our exploration of contestation as a value of constitutional labour law founded on citizenship, we came to the view that first, workers who play an institutional role in decision-making should be entitled to criticise their employer (and sometimes fellow workers) in robust terms. The 'norm of civility' ought to be relaxed, and trade union officials given a (conditional) form of 'parliamentary privilege' for their statements which may only be subject to sanction by their fellow workers through (*eg*) the trade union's internal grievance process, unless there is no functioning disciplinary process within a representative union. This principle can be extended to apply to other forms of structured representation, like works councils. This conditional privilege for criticism incentivises workers to organise. Second, outside this context, criticism should still be tolerated if it relates to the productive process in a workplace with no formalised mechanism for internal deliberation among workers. Rather, that is to say, the more autocratic and hierarchical the workplace is, the more we should protect workers who are critical of productive decisions (as opposed to, say, personal characteristics of managers). If businesses want to avail of protection for their reputation from public criticism by their workers, they must incorporate democratic processes which include open deliberation by workers internally. This incentivises employers to accede to workers' demands for structured internal representation.

We may contrast this position with that prevailing in Strasbourg. The ECtHR has a disappointingly mixed record on sensitivity to the special role of trade unionists and the context of industrial disputes. On the one hand, there are positives: in *Fuentes Bobo v Spain,*[29] a worker was interviewed on national radio in respect of an industrial dispute, during which he made comments that managers at his employer were 'leeches', corrupt, and did not care about workers. He was dismissed, but the ECtHR held this was a violation

[29] Application no 39293/98.

of Article 10.[30] On the other, we have *Predota v Austria*,[31] in which a 'very active' staff representative was demoted after raising internal grievances – he then sought to publicise these by distributing leaflets and doing media interviews. He was dismissed, and the ECtHR held the application under Arts 6, 7, 8 and 10 inadmissible, on the basis that the applicant violated his duty of loyalty to his employer by undermining its reputation.

The most prominent case is *Palomo Sánchez and others v Spain*.[32] Here, workers involved in an industrial dispute with their employer formed a minority union after they were unhappy with the settlement recommended by the majority union. They published a newsletter, which was distributed in the workplace, that was highly critical of both management and colleagues who were leaders of the majority union on the basis they had 'sold out' their fellow workers, and featured a vulgar cartoon depicting those colleagues performing sexual favours for a manager. They were dismissed, and the ECtHR found no violation. Here we can see the clearest advantage of a 'parliamentary privilege' approach – the cartoon was unsavoury perhaps, but freedom of expression for organised labour should extend to that which 'offends, shocks or disturbs' (to borrow the Court's parlance) where it is genuinely connected to the governance of the workplace. The minority judges pointed out:

> The imposition of such a harsh sanction on trade-union members, who were acting in their own names but also to defend the interests of other workers, is likely to have, generally speaking, a 'chilling effect' on the conduct of trade unionists and to encroach directly upon the *raison d'être* of a trade union.[33]

Of course, in *Palomo Sánchez*, we are dealing with a breakaway minority union. It is clear this union was not representative, nor was there an effective internal disciplinary structure in place. As such, with due regard for the value of contestation, it is plausible that the employer was justified in intervening. However, a court should be very slow to conclude that, in the absence of weighing up those values we set out earlier in the chapter against

[30] See also *Ezelin v France* Application no 11800/85.
[31] (dec) Application no 28962/95.
[32] Applications nos 28955/06, 28957/06, 28959/06 and 28964/06. For a recent case explicitly building on the link between freedom of expression and trade union activity recognised (if not protected, on the facts) in *Palomo Sánchez*, see *Straume v Latvia* Application no 59402/14.
[33] Applications nos 28955/06, 28957/06, 28959/06 and 28964/06, [17] (joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić).

evidence of a risk of serious harm to working relationships. We also observed earlier that a broad interpretation should be taken of the connection between the criticism and workplace decision-making – and indeed, of the '*raison d'être* of a trade union' referred to by the minority in *Palomo Sánchez*. In *Szima v Hungary*,[34] a senior police officer who was also a leader of the police trade union was demoted (and convicted of the criminal offence of 'incitement to insubordination') after she posted an online blog post that was critical of not just the way her members were being treated at work, but of corruption and mismanagement among senior ranks of the police force. The Court declined to find a violation of Articles 10 and 11, holding that although *some* of what she had written involved 'labour-related issues', her 'critical views about the manner in which police leaders managed the force' were 'outside the scope of trade union-related activities' and 'the mandate of a trade union leader'.[35] The dissenting Judge Tulkens, however, argued the Court should not decide what is the legitimate scope of trade union activities, and certainly not confine union activities to pay and conditions of members, excluding participation in the management of the organisation more broadly.[36] The minority reasoning is convincing on this point: we saw in earlier chapters that the labour movement has always had broader goals than bargaining over material issues, with aspirations towards economic and political democracy. In light of our emphasis on participation in productive decision-making writ large, it would therefore be inappropriate to limit the scope of the privilege afforded to union activists to 'bread and roses' concerns.

Outside the trade union context, there are several further cases in which the ECtHR has found no violation for the dismissal of a worker for criticism of the employer, with no obvious distinctions drawn between criticism of productive decisions and personal allegations. For example, in *Lichtenstrasser v Austria*,[37] the applicant was interviewed at a trade show in which he remarked that he intended to set up his own business in pursuit of greater 'freedom'. This was interpreted by his employer as implying that they treated their workers unfairly. He was asked to resign, which he did but later claimed constructive dismissal, and the ECtHR held the application under Arts 6, 10 and 13 inadmissible.[38]

[34] Application no 29723/11.
[35] Application no 29723/11, [31].
[36] Application no 29723/11, [4] (dissenting opinion of Judge Tulkens).
[37] (dec) Application no 32413/08.
[38] See also *Jacubowski v Germany* Application no 15088/89; *De Diego Nafria v Spain* Application no 46833/99. There are some outliers: in *Raichinov v Bulgaria* Application no 47579/99, the applicant made allegations of corruption against a colleague at a meeting. His employer (the public prosecutor office)

Interestingly, the ECtHR is happier to protect worker criticism of the employer when it can be characterised as whistleblowing. In *Guja v Moldova*,[39] the applicant leaked internal documents from the public prosecutor office where he worked to expose efforts by politicians to influence the prosecution of corrupt police officers. He was dismissed, and the ECtHR found a violation of Article 10.[40] It seems to depend on the substance of the allegations being made – these related to wrongdoing, potentially criminal in nature, rather than merely to disagreements over conditions or management decisions[41]. However, many of the above cases ultimately relate to decisions about the administration of production. Given the advantages we saw earlier to trade unions in publicising their criticism of employers to win public support in an industrial dispute, constitutional labour law should treat all such cases like the ECtHR has treated whistleblowers.

Religious accommodation

Thus far, the areas of controversy examined through the case law seem to have more to do with contestation than the other three values we explored above, although diversity of political belief has been discussed. This makes sense in light of Bogg and Estlund's explanation of how contestation is a precondition to participation in decision-making, which has been our lodestar in developing a citizenship-based theory of constitutional labour law. But just as contestation is a precondition to participation, it is clear from our discussion above that diversity, moral independence and integrity are preconditions to meaningful contestation. One cannot simply 'contest': one must do so on the basis of beliefs and values. This is true whether we are discussing decision-making structures within the workplace, or broader social and political participation of workers as citizens. If diversity of beliefs and the ability to develop these independent of pressure from the powerful are

instituted criminal proceedings against him for defamation, which resulted in a fine, but he was not dismissed. The ECtHR found a violation of Article 10, but this may have had more to do with the disproportionality of a criminal prosecution in these circumstances. In *Rubins v Latvia* Application no 79040/12, the head of a university department faced redundancy when his department was merged with another. In correspondence with the head of the university, he made a number of complaints about the process by which the decision to merge departments was made, and of misconduct on the part of various university officials. He was dismissed, but the ECtHR found a violation of Article 10.

[39] Application no 14277/04.

[40] See also *Heinisch v Germany* Application no 28274/08.

[41] For recent examples, see *Goryaynova v Ukraine* Application no 41752/09, *Halet v Luxembourg* Application no 21884/18 and *Gawlik v Liechtenstein* Application no 23922/19.

not protected, and sticking to those beliefs not respected, the ability to contest is not worth much, and the ability to participate even less.

The cases that will be examined in this section involve workers seeking accommodation for their beliefs in the workplace.[42] There are, once again, nuances: we start with examples of workers sanctioned for mere adherence to a religious belief. These are most closely analogous to the political affiliation cases we saw above: employers are generally concerned that someone's religious beliefs betray a lack of trustworthiness or that it will reflect badly on the employer to be associated with someone with those beliefs. In *Ivanova v Bulgaria*,[43] the applicant was a swimming pool manager at a school. He was also a member of an evangelical Protestant church. Following a media campaign against the school for employing members of this 'clandestine'[44] religious group, the applicant was dismissed. The ECtHR found a violation of Article 9, noting as it did so that the employer could not argue both that the dismissal had nothing to do with the applicant's religion *and* that he was accused of proselytising in the workplace (for which there was no evidence).

The Court tends to draw the line here: it is a violation of the Convention to dismiss someone because of their religious beliefs,[45] but not for trying to spread those beliefs to others within the workplace. A particularly stark example is *Pitkevich v Russia*:[46] the applicant was a member of an evangelical Protestant church, who was dismissed from her position as a judge on foot of allegations that she had recruited legal administrators into the church, prayed during court hearings, and promised litigants favourable decisions if they converted to her faith. The ECtHR noted (as we have also alluded to above) the special position of the judiciary in respect of their expressive activities, and found that the applicant had not been dismissed because of her religious views but because she used the judicial power

[42] There are many different kinds of accommodation which may be requested on the basis of religious beliefs, only some of which will be considered here. For more, see Marie-Claire Foblets and Katayoun Alidadi (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Routledge 2012); and Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).
[43] Application no 52435/99.
[44] This church had been refused inclusion on a state-mandated register of religious organisations; since registration was necessary in order to be allowed hire meeting spaces, the community often found its meetings broken up by police raids.
[45] Except, in some circumstances, for religious organisations themselves: see, for example, *Siebenhaar v Germany* Application no 18136/02.
[46] (dec) Application no 47936/99.

vested in her to promote those views. It found the application under Arts 6, 9, 10 and 14 inadmissible.

In other cases, the employer does not (at least ostensibly) have any problem with the worker's religious adherence, but argues that their conduct (motivated by that religious adherence) conflicts in some way with the demands of the job. We saw that if the conduct amounts to proselytism, dismissal is permitted. Other cases involve time off, dress and conscientious objection.

(a) Adjustments to working time

In *X (Ahmad) v United Kingdom*,[47] the applicant was a Muslim who worked as a schoolteacher. At various times in his career he had been given permission to take an extended lunch break on Fridays in order to attend prayers at a nearby mosque. He was eventually offered the choice between going part-time (finishing on Fridays at lunch time and not returning to school) or dismissal. He initially elected for the latter, but was subsequently re-engaged on a part-time basis. The European Commission for Human Rights found the application under Arts 9 and 14 inadmissible, on the bases that (a) the applicant had not disclosed to his employers at time of hiring that he might at some point in the future require time off to pray;[48] (b) the applicant was free to resign at any time, and to take up part-time employment (as he ultimately did);[49] and therefore (c) 'the applicant, of his own free will, accepted teaching obligations under his contract'.[50] Similar reasoning motivated *Konttinen v Finland*[51] and *Stedman v United Kingdom*,[52] in which the applicants were devout Christians who refused to work on the Sabbath. Mr Konttinen had offered to make the time up elsewhere, but the employer declined; this option did not appear to be canvassed for Ms Stedman. The European Commission for Human Rights found both cases inadmissible, holding that the right to quit one's job is 'the ultimate guarantee of [the] right to freedom of religion'. It is also worth noting that the applicant in *Stedman* had asserted a general belief that the Sabbath was a day for 'non-commercial, family and religious

[47] (dec) Application no 8160/78.
[48] (dec) Application no 8160/78, [14].
[49] (dec) Application no 8160/78, [15].
[50] (dec) Application no 8160/78, [9].
[51] (dec) Application no 24949/94.
[52] (dec) Application no 29107/95.

activities' and that the Commission identified an 'almost inevitable compromise and balance between work' and these commitments.

In *Kosteski v FYROM*,[53] the applicant took time off work (with pay) for religious holidays that were, by law, only available for those of the Muslim faith (with other holidays likewise reserved for Christians). It was apparent that the applicant had, in the past, celebrated Christian holidays, so the employer demanded proof that the applicant was now Muslim, which the applicant was unwilling to provide. As such, the applicant was demoted and docked pay. The ECtHR found no violation of Arts 9 nor 14, drawing an analogy to circumstances where the state may require a conscientious objector to substantiate his religious adherence in order to avoid military service.[54]

(b) Religious symbols

In respect of religious dress, the Court has steadily moved away from a reliance on waiver, towards requiring employers justify any prohibition. In *Dahlab v Switzerland*,[55] the applicant was a primary school teacher who wore an Islamic headscarf. After four years with no objections from colleagues nor parents of students, a school inspector reported the matter to the local authority, who prohibited the applicant from wearing the headscarf. The ECtHR found the application under Arts 9 and 14 inadmissible. Unlike in other cases above, the Court did not base its reasoning on the fact that the applicant could resign; rather, it held (a) children are very impressionable and visible religious symbols 'might have some kind of proselytising effect' even though it was acknowledged the applicant was not actively engaged in proselytism; (b) the Islamic practice of wearing headscarves is 'hard to square with the principle of gender equality' that teachers should be expected to espouse.[56]

The Court stepped further away from the position that resignation is the 'ultimate guarantee' of religious liberty in *Eweida and others v United Kingdom*.[57] Two of the

[53] Application no 55170/00.
[54] Application no 55170/00, [39].
[55] (dec) Application no 42393/98. Other cases in a similar vein include: *Kurtulmuş v Turkey* (dec) Application no 65500/01; *Karaduman and Tandoğan v Turkey* Applications nos 41296/04 and 41298/04; *Melek Sima Yilmaz v Turkey* Application no 37829/05.
[56] For critical discussion, see Neus Torbisco-Casals, 'Multiculturalism, Identity Claims, and Human Rights: From Politics to Courts' (2016) 10(2) Law & Ethics of Human Rights 367.
[57] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10.

applicants in this case, Ms Eweida and Ms Chaplin, wanted to wear visible crucifixes at work. Ms Eweida was a member of the check-in staff for an airline; she was offered a non-customer-facing role, which she refused; ultimately, the employer relented and changed their uniform policy. Ms Chaplin was a nurse; she was initially moved to a non-clinical role; she was later made redundant. The ECtHR overruled the position adopted in *Konttinen* and *Stedman*, on the basis that this approach is not used for other Convention rights.[58] However, it reached different decisions in the cases of Ms Eweida and Ms Chaplin. In respect of the former, the Court recognised that the employer was pursuing the legitimate aim of protecting its 'corporate image', but that the applicant's religious symbol was 'discreet' and 'cannot have detracted from her professional appearance' so there was a violation of Art 9.[59] For the latter, the Court held that not only was the health and safety of patients a legitimate aim for the employer to pursue (it was considered that any jewellery could get caught during medical interventions), but that this aim was 'inherently of a greater magnitude' than corporate appearance.[60] As such there was no violation of Arts 9 nor 14.[61]

There are serious problems with the approach of the Court.[62] First, a prohibition on the wearing of religious symbols is not always neutral as between religious and non-religious employees. We can draw a distinction between cases like *Eweida* on the one hand, and those like *Dahlab* on the other.[63] In the former, the workers were required to wear a *uniform* (that did not include a crucifix – but did include other religious symbols like turbans and

[58] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, [83].
[59] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, [94]-[95].
[60] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, [99].
[61] The importance of the employer's justification for restricting the freedom to manifest religious belief by wearing items of clothing has become central to subsequent cases. In *Ebrahimian v France* Application no 64864/11, the applicant was a social worker in a public psychiatric hospital who wanted to wear a headscarf (It is described in the decision as a 'veil' but the Court specifically says at [46] it does not cover her face). The ECtHR noted at [21], [66]-[68] the historic importance of secularism to the French state, and at [53] that the patients in the hospital were 'in a vulnerable situation'. It was considered necessary that 'patients cannot harbour any doubts' about the equality of treatment of patients which (the Court held) may be compromised if staff displayed visible signs of religious adherence (see [63]-[64]). The Court explicitly held at [64] that the state has greater leeway to demand 'neutrality' (that is, to restrict religious expression at work) of public employees than is available to private employers, presumably on the basis that the state has inherently greater justification for doing so.
[62] Some were identified by Philippa Collins, 'Covering up? Client embarrassment, neutral intolerance and wearing headscarves at work' (2018) 134(Jan) Law Quarterly Review 31. The analysis here goes further than Collins.
[63] Other cases like this include those considered by the Court of Justice of the European Union in recent years: C-157/15 *Achbita v G4S Solutions*; C-188/15 *Bougnaoui*; and C-804/18 *IX v WABE; Müller Handels v MJ*. Space precludes consideration of CJEU case law, but similar criticisms apply.

headscarves)[64] and wanted an exemption from the uniform policy that would allow them to wear a crucifix, for religious reasons. In the latter, the worker was permitted to wear whatever she liked, so long as it did not include a religious symbol. The ban was not, therefore, on headscarves, but on headscarves worn for religious reasons. That suggests, curiously, that the applicant would have been permitted to wear a headscarf so long as it was not for religious reasons.[65] Second, a prohibition on religious symbols is not necessarily 'displaying religious neutrality'. That depends on social context: in a society where everyone wore a headscarf or crucifix for religious reasons, not wearing one would be a display of religious belief – that is, the belief that such a symbol is not required for religious reasons.[66]

Some commentators have argued that we should focus less on whether wearing a religious symbol is *expressive* of religious belief,[67] than on the fact that particular symbols *identify* people as (potentially) belonging to particular religions.[68] For example, Howard defines symbols as straddling expressions of belief and 'form[ing] part of a person's identity.[69] To

[64] Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 280.

[65] This is a curious inverse of the distinction sometimes drawn between allowing the wearing of symbols that *manifest* religious belief (typically those required by the tenets of the religion, though these categories are not congruent), while prohibiting those that are 'merely' *motivated by* religious belief (typically not required). For more, see Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 21-23; John Corvino, 'Is Religion Special? Exemptions, Conscience and the Culture Wars' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 2,14-15, 20; Peter Jones, 'Conscientious Claims, Ill-Founded Belief and Religious Exemption' in the same volume, ch 3, 36-37.

[66] The point may tentatively be made more broadly: *not* wearing a particular religious symbol, whether everyone else does so or not, is an indication that the person in question believes such a symbol is not required by virtue of divine commandment – either because one believes in a different set of divine commandments, or because one believes there are no divine commandments at all. Both of these are equally theological claims: indeed, it is the view of the author that we generally underappreciate how much of what we believe and do are 'religious' in a broad sense, as reflecting claims that are properly theological. But that is far beyond the scope of this thesis. Suffice to say it may be as much a 'manifestation of belief' for a Christian or atheist *not* to wear a headscarf as it is for a Muslim to wear one – even if the Christian or atheist has never thought particularly hard about whether they should wear a headscarf, they will have absorbed this presupposition from their cultural environment.

[67] Partly because wearing and not wearing are both expressive of religious belief, and partly because (as will be shown) religious symbols are an unreliable indicator of any particular substantive belief.

[68] What François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 324 call a 'passive display of affiliation'. See also Richard Moon, 'Conscience in the Image of Religion' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) 74-78. Likewise, of course, not wearing any particular symbol is indicative of not belonging to a religion associated with that symbol, or of belonging to the religion but contesting its teachings – in both of which cases, not wearing a symbol is making a significant claim about identity or belief, again depending on social context. Alternatively, it may be that by not wearing (or not being permitted to wear) a symbol, one demonstrates a failure to live up to the requirements of one's religion – which may indicate a lack of integrity.

[69] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 33.

a certain extent, we in the West may be limited in our perspective on the role of religious symbols by our predominantly Christian heritage:[70] scholars have observed that we conventionally think of religions as being dependent on *beliefs* (with some practices being manifestations of those beliefs), whereas many religions are based more on *practices* themselves, and on *belonging* to a community characterised by common cultural practices.[71] Therefore, for many people, the distinction between the *forum internum* and *forum externum* may not be as clear-cut as we like to think. Meanwhile, what symbols are intended to mean by the wearer, and are perceived as meaning by the observer, are not always the same, and in either case the meaning 'is dependent upon layers of culture'.[72] Levrau and Loobuyck go so far as to deny that religious symbols convey beliefs at all, arguing that it is impossible to discern someone's substantive views on any particular issue merely from the presence of a symbol that is associated with a particular religion, which the observer associates in turn with certain views on substantive issues. Of course, most adherents to any particular religion are likely to believe most of what that religion holds as tenets, but many will be dissenters on a variety of substantive teachings,[73] and it is generally not possible to discern these from a symbol itself.[74] Symbols are an unreliable indicator of substantive views on any particular issue. Therefore, even if an observer finds some of the 'canonical' teachings of a religion offensive, 'such a form of association [of the symbol-wearer with the teaching] seems too weak an affiliation to be legitimately penalized'.[75]

[70] Tom Holland, *Dominion* (Little, Brown 2019). François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 323 argue this is a specifically *Protestant* Christian understanding of beliefs and practices. See also Brad S Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Harvard University Press 2012); Alasdair MacIntyre, *After Virtue* (4th edn, Bloomsbury Academic 2014).

[71] Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 59, 77, 141. See also Karen Armstrong, *A History of God* (Ballantine Books 1994); *A Short History of Myth* (Canongate 2005); *The Great Transformation* (Atlantic Books 2007); *The Lost Art of Scripture* (Bodley Head 2019); and *Religion* (Vintage Minis 2019).

[72] Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 30.

[73] Peter Jones, 'Conscientious Claims, Ill-Founded Belief and Religious Exemption' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 3, 46; Paul Billingham, 'Exemptions for Religious Groups and the Problem of Internal Dissent' in the same volume, ch 4.

[74] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 127 observes with approval that the cases that deal with this issue through the lens of indirect discrimination do not ask whether religious symbols are manifestations of belief; merely whether it is more likely that someone of a particular religion would wear this symbol, such as to create a disproportionate impact that requires justification by the employer.

[75] François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 324. The foregoing is contested: Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 7 argue trenchantly that religions are 'uniquely and unjustly intolerant' in that adhering to any particular religion necessarily implies an adverse

Safer to treat the wearing of a religious symbol as a cultural practice and marker of *identity*, than as a manifestation or expression of *belief*.

Viewed in these terms, 'presenting religious neutrality' amounts to saying that one's religion should not be identifiable in the workplace.[76] It is not clear why this is desirable. There is no self-sufficient reason to seek epistemic ignorance of the (protected) characteristics of workers. The courts would not accept an employer's policy of disguising other such characteristics: the idea that people with disabilities could be obliged to hide them from view is repugnant, and the idea that workers should disguise their sex or race is farcical.[77] Bacquet argues that we should conceive of religious symbols as similarly constitutive of identity; in determining whether to allow them to be worn at work, we should ask how essential are they to workers' identity, and what the impact compelling a worker to hide that identity will have on their well-being.[78] It is unlikely that an employer would sanction a worker merely for informing a colleague as to their religion, no more than if he told her what country he came from. As such, the aim of displaying religious neutrality is not the same as employer being neutral as to religion – often, quite the reverse.[79] Requiring the display of religious neutrality (a) favours religions that focus on belief over practice; (b) favours workers whose identity (religious or not) is not constituted by the display of symbols; and (c) treats religious affiliation as a characteristic to be hidden, which is different to how other identity characteristics are treated. In the interests of diversity and

judgment about non-adherents, and that the wearing of a religious symbol inherently (independently of whether this was the intention of the wearer) communicates this 'adverse moral judgment' to others. Here is not the place to engage with this line of argument: for some critique, see John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13.

[76] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 114 argues that compelling workers to hide their religious affiliation or identity is based on assumptions about inferences potentially drawn by customers or colleagues about people who hold religious beliefs – inferences which may themselves be inconsistent with pluralist democracy.

[77] For a contrary viewpoint, Aileen McColgan, 'Class Wars? Religion and (In)Equality in the Workplace' (2009) 38(1) Industrial Law Journal 1 is adamant that religion should not be considered a protected characteristic in the same manner as race, sex, disability, *etc*. Here is not the place to defend a prohibition on discrimination on grounds of religion.

[78] Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 147. See also Richard Moon, 'Conscience in the Image of Religion' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 5 74-77; Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in the same volume, ch 9, 175; John Adenitire, 'Conscientious Exemptions in a Liberal State' in the same volume, ch 13, 253.

[79] For more on 'neutrality' in the workplace, see Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).

moral independence of workers, the employer being neutral towards (that is, tolerant of)[80] religion seems preferable (what Bacquet calls 'benevolent neutrality').[81]

(c) Conscientious objection

The final category of accommodation cases is those in which the worker objects on religious or philosophical grounds to a particular task he is required to carry out as part of his job.[82] We should distinguish here between people who object to something about their employer and so refuse to carry out activities that are not strictly related to the thing they object to – for example, in *Knudsen v Norway*,[83] the applicant was a minister in the state established church who, in protest against the state's legalisation of abortion, refused to carry out the civil functions of his role (such as registering births and marriages). The European Commission for Human Rights held that 'this refusal did not actually express the applicant's belief or religious views… even when it was motivated by such views or belief' and as such the application was inadmissible. In any event, the Commission also followed the 'ultimate guarantee of religious liberty is resignation' approach we saw above, that was later overturned in *Eweida*. Really, though, the best way to think about cases like *Knudsen* is as a species of strike. We do not have space in this thesis to discuss that further.

Pichon and Sajous v France[84] is closer to the mark, although here the applicants were the owners of a pharmacy who were subjected to prosecution for refusing to fill prescriptions for contraceptives. The ECtHR found the application inadmissible, holding that 'the applicants cannot give precedence to their religious beliefs and impose them on others… since they can manifest those beliefs in many ways outside the professional sphere.' Those are, of course, three separate questions: (a) whether a worker may 'give precedence' to his religious beliefs over (some) obligations of his employment; (b) whether he may 'impose' his religious beliefs on others; and (c) whether (and how) he is entitled to 'manifest' his

[80] On neutrality and tolerance, see Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 7.
[81] Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 113.
[82] For a broader discussion, see John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019); Andrew Koppelman, *Gay Rights vs Religious Liberty? The Unnecessary Conflict* (Oxford University Press 2020).
[83] (dec) Application no 11045/84.
[84] (dec) Application no 49853/99.

beliefs at work or must reserve that for 'outside the professional sphere'. Perhaps because it is an admissibility decision, *Pichon and Sajous* does not deal with these distinctions adequately.

It was only in *Eweida* that these issues were the subject of detailed analysis. Two of the applicants (both Christians) made conscientious objection arguments: Ms Ladele was a civil registrar who refused to officiate civil partnership ceremonies; Mr McFarlane was a relationships and sexuality counsellor who refused to offer therapy to gay couples. Both were happy to carry out the other responsibilities of their job. The ECtHR found no violations for either applicant. First it noted that one factor (though not determinative, as the results demonstrated) was whether the worker knew he would be obliged to carry out this activity when he took the job – this was true for Mr McFarlane but not for Ms Ladele.[85] The 'most important factor', however, was that in both cases the employer was trying to protect the rights of service users to private and family life and the enjoyment of rights without discrimination.

In their partly dissenting opinion, Judges Vučinić and de Gaetano explicitly characterised the case as 'not so much one of freedom of religious belief as one of freedom of conscience – that is, that no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience'.[86] They argued that conscientious objection enjoys a higher standard of protection under the Convention than religious belief, which they considered to be confined to matters such as 'not to eat certain food (or certain food on certain days); the wearing of the turban or the veil, or the display of religious symbols; attendance at religious services on certain days'.[87] They argue that the Convention exists to 'avoid that obeying one's conscience must still require payment in heroism', specifically martyrdom.[88] They placed ultimate weight on the fact that Ms Ladele was hired as a

[85] Applications nos 48420/10, 59842/10, 51671/10 and 36516/10, [106], [109].
[86] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [2] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).
[87] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [3] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).
[88] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [3] (joint partly dissenting opinion of Judges Vučinić and de Gaetano). *Pace* John Corvino, 'Is Religion Special? Exemptions, Conscience and the Culture Wars' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 2, 24-25 who argues that accommodating conscientious objections 'simply provide[s] integrity on the cheap'; and the prospect raised by Ian Leigh, 'The Courts and Conscience Claims' in the same volume, ch 6, 93 that we could always put people's integrity to the test by denying them the

registrar before gay civil partnership was legalised, whereas Mr McFarlane could be likened to a 'volunteer' soldier and thus not entitled to conscientious objection.[89] They also observed that Ms Ladele's employer could adduce no evidence that it would be unable to discharge its functions by assigning gay couples to a different registrar. They considered it 'a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights [*sic*])' that led to Ms Ladele's dismissal.

Pluralism and reasonable accommodation[90]

We should obviously deplore both the language used by the minority judges in *Eweida* and the underlying rationale that motivated it (*ie*, that marriage or non-discrimination are not 'fundamental human rights' when invoked by gay people).[91] We should probably also resist the minority's comparison of death 'at the hands of the Spanish Inquisition [or] Nazi firing squad'[92] with dismissal by the London Borough of Islington (not least because of the implications of Godwin's Law).[93] Less evidently distasteful but still worthy of critique is the distinction drawn between a *religious* belief that one should follow a certain diet and a belief of *conscience* that is 'nurtured by religious beliefs'[94] that gay people should not be allowed to get married. That seems to denigrate the seriousness with which many religious people follow requirements of prayer, diet, dress and symbolism and the centrality of such ritual to religious faith. There may well be reasons to resist certain forms of religious accommodation (we will return to this below), but it does not seem sustainable to draw the line at whether the person 'recognises the moral quality of a concrete act' or makes a 'rational judgment on what is good and what is evil'.[95] It seems to require too much

accommodation they seek for their conscientious objection: 'willingness to suffer [is] taken as a mark of sincerity'.

[89] Application no 48420/10, [5] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).

[90] For more, see Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).

[91] For further criticism of the judgment as a whole, see Aileen McColgan, 'Class Wars? Religion and (In)Equality in the Workplace' (2009) 38(1) Industrial Law Journal 1; and Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277.

[92] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [3] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).

[93] See 'Godwin's Law' in Darrel Ince (ed), *A Dictionary of the Internet* (2nd edn, Oxford Reference 2009) <https://www.oxfordreference.com/view/10.1093/oi/authority.20110810105009431> accessed 8 November 2021.

[94] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [2] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).

[95] Application no 48420/10, 59842/10, 51671/10 and 36516/10, [2] (joint partly dissenting opinion of Judges Vučinić and de Gaetano).

adjudication on the substance of religious doctrine to be confident that wearing a headscarf or resting on the Sabbath does not amount to a judgment about the moral quality of those actions.

Indeed, although the language and underlying philosophy of the minority judgment is fairly contemptible, it does help refocus our attention on what is at stake in religious accommodation cases. Contrary to what the judges themselves argue, the case actually highlights that all the forms of accommodation we have canvassed in this section may be considered conscientious objection to working practices: meaning not just the nature of the actions, but the timing and other arrangements like uniforms – in other words, *contestation of decisions about the organisation of production*, motivated by religious beliefs. While it is not practicable to accommodate all objections to how production is organised if there is to be any production at all, a theory of constitutional labour law that incorporates the values of contestation, diversity, moral independence and integrity must grapple with the question of how to manage objection.

We have repeatedly emphasised that the best way for employers to accommodate objections to – that is, facilitate contestation of – productive decisions is to allow collective worker participation in those decisions. The preceding sections have indicated that the more worker participation there is in setting rules and policies and determining the consequences for breaches, the more leeway we might allow employers in enforcing those rules that put pressure on workers' moral or political beliefs. But even there we must be careful, because it is not guaranteed that workers will collectively incorporate the values of diversity and moral independence of their colleagues.[96] Those values are of free-standing importance, and any balancing exercise of the employer's aims and worker civil liberties must be mediated through them. We should be particularly sceptical of aims towards 'neutrality' in questions of morality or identity, since these are often anything but.[97] We should strive

[96] *Redfearn* is a case in point: his dismissal came after a complaint by a number of trade unions to the employer.

[97] Part of the problem is that 'neutrality' is misleading (and not just for the reasons discussed above): there is an elision of the question whether 'secularism' is itself 'neutral' (as between religions), or whether pluralist liberalism demands 'neutrality' between religion(s) and 'secularism' *itself*. For some discussion, see the concurring opinion of Judge Power in *Lautsi v Italy* Application no 30814/06; the partly concurring and partly dissenting opinion of Judge O'Leary in *Ebrahimian v France* Application no 64846/11; Sylvie Bacquet, *Religious Symbols and the Intervention of the Law* (Routledge 2020) 113; François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 326ff; and various contributors to John Adenitire (ed), *Religious*

instead for 'neutral pluralism'[98] or 'liberal tolerance'[99] on the part of employers, as the best way to safeguard contestation, diversity, moral independence and integrity on the part of workers, and thereby facilitate their functioning as citizens. Constitutional labour law should demand evidence from employers of pressing reasons why accommodating worker objections would undermine production. For example, we can see a good reason to distinguish between Ms Eweida and Ms Chaplin on the basis that a swinging crucifix could pose a safety risk in hospital, but make no difference to one's performance as a check-in operator (or a teacher in *Dahlab*).[100] As for whether the courts should recognise the rights of parents to shield their children from the influence of religion while at school, we should be nuanced here. Proselytism is dealt with separately by the ECtHR to dress accommodation, and in the interests of protecting the moral independence of other workers, that seems fine (although mere expression of religious belief is not necessarily an attempt to influence others in that belief).[101] It was explained above how prohibitions on dress motivated by religion serves only to limit *identification* of people's religious adherence. But knowing that someone else is a Muslim does not, in itself, make anyone want to become Muslim themselves. Of course, children are more impressionable than adults and may seek to mirror the behaviour of caregivers like teachers; but this may be a risk we simply have to run in a multicultural society. Remember that such workers should be prohibited from proselytising children, and even if a child did want to mirror *wearing a headscarf*, that does not mean the child is genuinely influenced *to become Muslim*. It would be absurd to think that encountering a teacher in a wheelchair would influence children to want to become disabled – even if children may be curious about why the teacher is in the wheelchair, and perhaps try to mirror that.[102] Disguising religious identity makes no more sense, at least in the absence of compelling evidence to the contrary.

Beliefs and Conscientious Exemptions in a Liberal State (Hart Publishing 2019), particularly John Adenitire, 'Conscientious Exemptions in a Liberal State' in that volume, ch 13, 247; Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).

[98] John Adenitire, 'Conscientious Exemptions in a Liberal State' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 13, 247.

[99] Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 7, 113.

[100] As for *Ebrahimian*, there is no reason to think a nurse would treat patients differently on the basis of religion just because she is wearing a headscarf – no more than that a nurse *not* wearing a headscarf would treat Muslim patients worse than atheists or Christians.

[101] Andrew Hambler, 'Is There "No Place in the Work Context" for Religious Proselytism?' (2022) 51(2) Industrial Law Journal 346 argues for a permissive approach to workplace proselytism. Here is not the place to engage in that broader discussion.

[102] For more on the parallel between religion and disability, see Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017).

Of course, it is generally more likely that accommodations in the form of time off would disrupt production than dress accommodations. But even this should be approached sceptically, not on the basis of mere waiver. Accommodating disabilities, including by means of flexible working arrangements, is also likely to disrupt production.[103] Employers should be obliged to make the same reasonable accommodations as for workers with disabilities,[104] especially by enabling workers to make up time 'lost' to prayer or days of religious observance another time. *Koteski* raises the tricky question of whether employers are entitled to 'proof' of religious adherence from workers. It is not unreasonable for employers (and courts) to impose a requirement of sincerity of belief,[105] but there are limits to what sort of evidence can reasonably be expected. A track record of religiosity might be difficult: people are free to convert religion, or to change the intensity of their religious practice over time, perhaps even suddenly. Moreover, they are free to explore their faith, or a new faith, in ways that resonate with them at a particular time. It must depend on how great the cost to be borne by the employer is for the accommodation: in *Koteski*, the worker was entitled to paid holidays in addition to other holidays to which he was otherwise entitled; in cases where the worker simply wants to substitute time off and make it up later, for example, the employer might only be entitled to notice of feast days. The case for evidence of sincerity in order to accommodate the wearing of a religious symbol is less convincing still.[106]

Clearly, conscientious objection claims offer the most significant risk of disruption. Indeed, that is the whole point – the worker objects to an aspect of the productive process and does not want to play their part in it. There are two possible scenarios: one, the worker is genuinely necessary for the job to be done; two, the worker could be replaced by another,

[103] The same goes for accommodations for family reasons: see Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[104] For more on the comparison with disability accommodation, see Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 114; John Corvino, 'Is Religion Special? Exemptions, Conscience and the Culture Wars' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 2, 27; Ian Leigh, 'The Courts and Conscience Claims' in the same volume, ch 6, 90; Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in the same volume, ch 9, 178; Lucy Vickers, 'Conscientious Objections in Employment: Is a Duty of Reasonable Accommodation the Answer?' in the same volume, ch 10, 191ff.

[105] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 16; François Levrau and Patrick Loobuyck, 'With or Without Religious Symbols? Why Political Liberalism Is Inconclusive in the Case of Civil Servants' (2020) 26 Res Publica 319, 331; Peter Jones, 'Conscientious Claims, Ill-Founded Belief and Religious Exemption' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 3.

[106] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 16.

albeit potentially with some inconvenience and issues of fairness for other workers (*ie*, a cost). Of course, it is more likely in practice that this distinction falls down: by and large, there will be other workers available to cover (unless the objector is uniquely qualified), but none of them will want to;[107] this will be revisited in a moment. In any event, a conscientious objection represents a challenge to the employer's authority to organise production (deciding what tasks to do and assigning workers to those tasks): this is perhaps clearer in the second scenario, where production could go ahead but at the cost of managerial preference that it be done by *this* worker.

Of course, often there is more at stake in a conscientious objection case than a challenge to managerial authority. In many cases, the motivation for the objection causes dignitary harm to a group of customers: the example is gay people for Ms Ladele and Mr McFarlane in *Eweida*.[108] The majority in that case were right to accept that protecting the rights of customers and colleagues may justify failing to accommodate an objection.[109] As McCrea forcefully puts it, 'there would be no point in having anti-discrimination laws if they could not curtail the freedom of conscience and only bound those whose consciences did not tell them to discriminate.'[110] Like the Convention, our theory of constitutional labour law 'can permit an employer to regulate the at-work actions of employees *to ensure compliance with*

[107] Particularly if the reason for the objection is discriminatory in nature – such was the case for Ms Ladele in *Eweida*. Of course, it is important to recognise that if the objector is dismissed, other workers will have to take up the slack anyway.

[108] Regrettably, in light of the orthodox teachings on sexuality of various widespread religions, it is likely that gay people will often be the group of service users disrespected by someone on the basis of a religious conscientious objection. For discussion, see Andrew Koppelman, *Gay Rights vs Religious Liberty? The Unnecessary Conflict* (Oxford University Press 2020). For some signs of hope, see <https://outreach.faith/> accessed 20 July 2022.

[109] It is worth pointing out that what follows is not necessarily applicable to *businesses* that claim conscientious objections from providing services to certain groups of customers; this thesis does not consider this issue. For discussion, see Andrew Koppelman, *Gay Rights vs Religious Liberty? The Unnecessary Conflict* (Oxford University Press 2020); Frank Cranmer, 'Can Secular Non-Natural Persons be Said to Have a Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 12. There is also a potential special category of cases where employees should not be obliged to *attend* 'religious rites' (or secular events they reasonably infer has 'religious' import) to which they object. Again, this thesis does not consider these cases: for discussion, see John Adenitire, 'Conscientious Exemptions in a Liberal State' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 13, 284.

[110] Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 286. See also Aileen McColgan, 'Class Wars? Religion and (In)Equality in the Workplace' (2009) 38(1) Industrial Law Journal 1, 10; Yossi Nehushtan and Stella Coyle, 'The Difference between Illegitimate Conscience and Misguided Conscience: Equality Laws, Abortion Laws and Religious Symbols' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 7.

important public policy objectives such as non-discrimination.'[111] However, this should not be confused with protecting (a) the employer's reputation *per se*, nor (b) managerial prerogative to organise production. McCrea criticises the treatment of waiver in *Eweida* on the basis that:

> Workers who take jobs in supermarkets open seven days a week who but cannot work on Fridays or Saturdays for religious reasons are no less aware that they will struggle to fulfil all their employer's needs than was Mr McFarlane when he took a job with [a relationships counselling service] knowing some of its clientele is gay.[112]

We must recognise that taking time off work on Friday afternoons to attend a mosque does not cause dignitary harm to customers – even if it does potentially reduce the services available. To borrow the analogy used by McCrea, there is all the difference in the world between Rosa Parks being refused a seat on the bus because she is black, and because it happens to be full and the company cannot lay on extra buses due to driver unavailability.[113] We should also be careful in assessing whether the religious objection actually causes dignitary harm to customers or colleagues. In *Eweida,* there was no evidence that any gay couples were even aware that Ms Ladele was unwilling to register their civil partnership, nor Mr McFarlane give them relationship counselling, much less that anyone had been turned away from service. Initially, Ms Ladele's objection *had* been accommodated by her employer, with no evident impact on the scheduling of services, until other workers objected. We do not have evidence that *nobody* was willing to accommodate Ms Ladele; a deliberative process may well have resolved how to accommodate the objection, as well as potentially defusing tension that undermined working relationships.

This is, of course, a very sensitive situation: the rationale of other workers for refusing to be reassigned same-sex civil partnerships to register was a good one, and the inclusion of stigmatised members of society is obviously consistent with our theory of citizenship. There is a tension between the moral independence and diversity rationales set out above.

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[111] Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 285 (emphasis added).
[112] Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 286.
[113] Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 283.

'Internal' conflicts of values within our theory can occur, but these must be mediated, in the specific circumstances of the case, in terms of the theory itself. Assuming there are no self-standing good reasons not to accommodate the objection (like non-discrimination), we should put aside managerial preference and focus on the question of whether other workers are willing to cover for the objector (on the assumption that, as we pointed out above, it is reasonable to expect the objector to make up for the accommodation by, for example, working another time). This brings us back to a consistent theme of this chapter: that employers with more participatory management styles should get more leeway to restrict civil liberties. On a very simplistic level, that means employers should be obliged to consult with other workers to see if, collectively, their colleague's objection can be accommodated – under an expectation of reciprocity. No employer should be able to disclaim his obligation of reasonable accommodation if the workforce as a whole has not had an opportunity to offer accommodation. In more complex organisations or where the nature of the worker's objection is sensitive, the principle is that the more management reserves to itself the power to decide how production is carried out (such that a worker's objection to that productive process will not be accommodated), the closer the courts should scrutinise the employer's claim that accommodation would be unreasonable. Again, this incentivises employers to involve their workforce more in productive decision-making, if they want to avoid making accommodations.[114] It also leaves space for what Adenitire calls 'executive discretion' or bureaucratic solutions to conscientious objections, where employers can assign work through internal processes that accommodate objectors without customers ever being aware.[115]

Only in such circumstances should we rely on the option of 'exit' as a means for the worker to preserve his integrity. However, we should not forget about the preservation of 'voice'. If an employer cannot accommodate a conscientious objection (perhaps because colleagues are unwilling to rearrange their working patterns), such that the worker must compromise his beliefs or lose his job, he should not also be required to sacrifice his right to express those beliefs. Even if the would-be objector stays and does the job, he should be free to criticise his employer (or, where applicable, colleagues) for failing to accommodate his

[114] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 129.
[115] John Adenitire, 'Who Should Give Effect to Conscientious Exemptions? The Case for Institutional Synergy' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 11.

objection and to discuss his situation in public, without fear of sanction by the employer. This may not necessarily lead to a change in his situation, if the objection simply cannot be accommodated – but it may help him salvage his integrity in public. It may also mean, unfortunately, that some colleagues and customers will be offended – but the sort of dignitary harm that should justify overriding an objection must be set much higher than mere offence.[116]

Of course, where the reason for not accommodating the objection is to prevent discrimination, the worker should not be allowed to express his objection during the course of *interacting* with customers or colleagues, because this risks the same dignitary harm that justified overriding the objection in the first place.[117] The employer's reputation may well suffer if people associate the business with the views of the would-be objector – but this is exactly the 'guilt by association' attitude that constitutional labour law is trying to resist. It is simply unreasonable for customers or colleagues to think that a business endorses a worker's views by not sacking her for expressing them, just as it would be unreasonable to think the business endorses Islam by allowing her to wear a headscarf. Even if lots of potential customers *do* have such an attitude of imputing guilt by association in this way, the state has an interest in pushing back against that: those people are not acting as good citizens of a pluralist, liberal democracy. The state has a further interest in changing people's minds through socialisation; we recounted evidence above that people who hold objectionable or bigoted views are simply unlikely to change them if they are ostracised from the very places (like work) where they encounter diversity. Creating a 'martyr' is rarely productive in discrediting a cause. Strossen advocates 'non-censorious' methods as being both more consistent with pluralist, liberal democracy *and* more effective in accomplishing the goals of protecting vulnerable groups and encouraging change.[118] The

[116] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) 47, 65, 109ff, ch 6; Gerald Chipeur and Robert Clarke, 'The Art of Living With Ourselves: What Does the Law Have to do with Conscience?' in John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019) ch 9, 174ff.

[117] As Ronan McCrea, 'Religion in the Workplace: *Eweida and Others v United Kingdom*' (2014) 77(2) Modern Law Review 277, 283 argues convincingly, the harm done to customers does not come from denial of the service *per se* but from the discriminatory attitude. Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) 56 accepts on-duty prohibitions of offensive speech that reaches a certain level of seriousness; this seems to cohere with the 'norm of civility' from Cynthia Estlund, *Working Together* (Oxford University Press 2003) 24 as much as protecting the dignity of customers and colleagues.

[118] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press 2018) ch 8.

state is entitled to place a (reasonable) cost on businesses in order to achieve these aims – without that being taken to mean the business is endorsing either the state's purpose, or the substantive content of any belief it is obliged to accommodate.[119]

Conclusion

Our central research questions demand an explanation of why constitutional labour law should protect the civil liberties of their workers against interference by employers; and, where necessary, how these rights should be adjusted and balanced to fit the labour relationship. Though 'ethos employers' are beyond our scope, we have seen many examples of entirely 'secular' employers adopting charters of moral or political values as wide-ranging as any religious creed. Whether spurred on by the best of intentions to protect vulnerable customers and staff, or caught up in broader social trends and fearful of guilt by association with public controversy, these employers also try to impose constraints on the moral and political beliefs or actions of their workers.[120] Often, this stifles diversity and requires workers compromise their beliefs in order to keep their job, costing them their integrity and thus their opportunity to participate as citizens in a constitutional democracy. Constitutional labour law should resist this trend. There are very few instances where a worker's moral beliefs, religious practices or political activity pose a serious risk of disruption to the productive process, which is the ultimate concern of the capitalist enterprise. Those disruptions that do arise can often be managed by greater worker participation in internal decision-making, so there is little reason to privilege the decisions of autocratic managers.

At various points in this chapter, we have drawn the following connection between the twin values of citizenship animating this Part, participation and political independence: more participatory management ought to entitle businesses to greater leeway in restricting the civil liberties of workers.[121] More importantly, the converse: the more management reserves the power to set working conditions to itself, the more it should be obliged to

[119] See discussion in George Letsas, 'Accommodating What Needn't Be Special' (2016) 10 Law & Ethics of Human Rights 319, esp 330-31; but *cf* his discussion at 337ff.

[120] See, for example: <https://www.aboutamazon.com/about-us/our-positions>; <https://about.facebook.com/company-info/>; <https://www.shell.com/about-us/our-values.html>; <https://www.gazprom.com/sustainability/human-rights/>; <https://about.nike.com/en/impact> all accessed 18 July 2022.

[121] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2020) 129.

accommodate workers' rights to freedom of expression, association, privacy, freedom of conscience, free practice of religion, non-discrimination, *etc*. Autocratic employers hold no 'moral title' to make decisions that restrict workers' civil liberties. This approach to constitutional labour law would incentivise employers to be more democratic.

Of course, this approach may not appeal to all perspectives on the issues of civil liberties in the workplace. It may not be satisfactory as a matter of human rights theory. However, it is clearly desirable from the perspective of citizenship, on which our theory of constitutional labour law is based. We are concerned with promoting citizenship, and for that reason we protect civil liberties. If citizenship can be adequately protected through its participation value, we need worry less about civil liberties. That is not to say civil liberties at work do not have compelling normative status, but simply as a matter of practicality, when it comes for employers and courts to balance the normative values underlying civil liberties with other legitimate concerns in the workplace, the existence of collective participatory mechanisms obviates some of the harm done to individual workers by a restriction, within certain limits, of their civil liberties.

That said, we should not forget that the values of civil liberties are themselves necessary to make participation function properly. Workers should be free to contest decisions of their managers, internally and in public, alone and as part of an institutional role in the governance of the workplace. Contestation should be welcomed as the lifeblood of democracy and the hallmark of a citizen, especially when it comes from a position informed by the exchange of diverse ideas and experiences and held with integrity. The important thing to remember is that allowing employers to set up incentives for workers to abandon not just the ability to express their beliefs, but the ability to develop and maintain those beliefs in the first place, will not produce a population of good citizens, but only a set of retinues for powerful elites.

CHAPTER 11:
CONCLUSION

Introduction

This chapter will summarise the argument of the thesis as it developed throughout the successive chapters. It will conclude by suggesting areas of research inspired by our central research question, though not required to answer it, and which could not be covered in this thesis. First, however, we should recap the task this thesis set itself.

Central research question revisited

This thesis set out to answer a specific set of research questions about a specific legal phenomenon: **why, and how, should courts intervene in the labour relationship on the basis of constitutional norms?** We identified such intervention as 'constitutional labour law', the phenomenon of interest that requires explanation and justification. We understood these central research questions as ultimately being about what theory of constitutional labour law courts should follow, and by what theory we should critique their decisions. As such, the method to be followed in answering those questions took the form of applied normative political theory. The thesis aims to justify, as a matter of normative political theory, courts' reliance on constitutional norms in governing the labour relationship. It was 'applied' in the sense that legal doctrine from Ireland and the European Court of Human Rights would be used to illustrate theoretical concepts in practice, and to draw lessons to inform the theory from practical issues that arise in courts considering these issues.

Justification gap

Existing literature has approached constitutional labour law from various perspectives, though other scholars would not necessarily recognise the label we have used in this thesis. This is, in part, related to the ultimate reason these existing accounts fail to adequately explain and justify constitutional labour law: most other scholars are operating from a perspective focused exclusively on *human rights*, without a coherent basis connecting rights, the labour relationship, core demands of the labour movement, and the state.

By the end of Chapter 2 of this thesis, we had sketched the following requirements a theory of constitutional labour had to meet in order to resolve the issues existing theories struggled to explain:

1. What sorts of rights should be protected by constitutional labour law;
2. Why these rights are an important concern for labour law;
3. Why these rights should be enforced horizontally *at all*, and why against private employers *in particular*;
4. To what extent the rights should be balanced or adapted to the employment context;
5. Why the rights in question should be entrenched against waiver by the worker in a contract of employment; and
6. Why this is an appropriate subject matter for *constitutional* intervention and concern.

Argument of the thesis

The present thesis made the argument that the ideal of citizenship gives us a basis for making legal decisions about the interaction between constitutional norms and the labour relationship, providing theoretically robust answers to our central research questions. The labour relationship and the status of citizenship are interdependent. The ability of workers to function as citizens outside the workplace is influenced to a significant degree by what goes on in the workplace, and by the conditions of their relationship with an employer. Likewise, seeing workers as citizens demands that working conditions and relations fit a certain model, that respects the social and political status of citizenship. This has two elements that are mutually-reinforcing: first, the condition of 'submission and subordination' to which workers are subject on a day-to-day basis inhibits them from nurturing the 'habits of democracy' necessary to function as citizens. Second, worker-citizens are dissuaded from exercising their political and civic rights, including to freedom of expression and association, privacy, and the practice of religion or belief, out of fear of consequences should their boss find out, disagree, and impose sanctions on them. There may even be an incentive for workers to exercise their political rights in ways that benefits their employers' ends and interests. This could only diminish the political power of workers, and enhance that of employers. At a systemic level, that tends towards the disenfranchisement of workers and the capture of state institutions by employers. This

thesis is thus a response to the concern that liberal democracy risks sliding towards plutocracy,[1] in the absence of protection for workers' citizenship withing the labour relationship.

Chapter 2 canvassed existing academic literature on this subject, observing two paradigms of explanation for what we have called constitutional labour law: 'labour rights are human rights' and 'human rights at work'. There is obviously a connection between labour law and human rights (both in law and in theory) that is relevant to the justificatory project of this thesis; in other literature, questions about the enforcement of such rights have come to dominate the literature in this field. However, this chapter argued that constitutional labour law is not reducible to rights, and neither of the two paradigms through which the issues have been examined elsewhere are capable of adequately explaining and justifying constitutional labour law. This chapter identified a 'justification gap' neither set of theories can fill, in respect of the specific issues referred to above. It was demonstrated that each account manages to both demand too much, and explain too little, of constitutional labour law as it has developed in practice. In highlighting the flaws in these accounts, this chapter identified a number of key issues any theory that seeks to explain constitutional labour law must address, as set out above.

This thesis set out to close the justification gap from both ends: constitutional theory and the philosophical foundations of labour law. As such, it was necessary to revisit the theoretical basis for state intervention in the labour relationship – that is, for labour law. Chapter 3 discussed the established normative justifications for labour law, arguing that these various strands should best be viewed as a form of progression: from efficiency, to welfare, dignity, syndicalism and political participation. It argued that a central concern of labour law is, and always has been, to allow workers to participate as full, equal citizens in a constitutional democracy. The 'old constitutional currents' beneath labour law are explicitly concerned with the emancipation of workers, giving them control over their own lives and facilitating participation in civil society on equal terms with their fellow citizens. In this way, labour law has always been a profoundly political project, challenging to the way societies and economies are run. It is this aim, rather than the more readily-available

[1] Or else the backlash against worker insecurity may generate other forms of authoritarianism: see Alan Bogg and Mark Freedland, 'Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement' (2018) MPIL Research Paper Series, no 2018-15.

justifications of labour law like efficiency or the inequality of bargaining power, that properly explains constitutional labour law, and suggests a path for its development.

This insight required us to develop a conceptual model of 'citizenship' around which to build our theory of constitutional labour law. Chapter 4 (and the thesis more broadly) drew on political theory from liberal, republican and socialist traditions, demonstrating that constitutional labour law may attract support from across the academic and political spectrum. Our model of citizen is of a full member of a political community, who participates in the governance of that community, on certain terms that protect his interests, which are roughly equal to the terms on which all other citizens likewise participate. As a result, citizens need political independence from one another, which means protection from private power. This allows them to regard one another not as supplicants to be exploited and masters to be appeased, but as partners in a co-operative political enterprise.

Chapter 5 then relied on this model to defend justiciable constitutional rights for workers against employers. It drew on connections between citizenship, equality and social class to illustrate the threats posed by the labour relationship to workers' ability to function as citizens, and the need to place constraints on employer authority within the constitutional settlement of a polity. It is part of the project of constitutionalism that individuals in society relate to state officials as citizens rather than subjects, and that individuals relate to one another as *concitoyens* in this way. Only thereby can the political culture required to sustain the constitutional order as a democracy be maintained. This project is undermined where workers feel the need to 'cringe beneath the rich man's frown', with institutional power structures replacing fraternal, public-spirited citizenship as the basis of interpersonal relationships. Developing citizenship among the population is therefore in the interests of the state, properly considered.

Basing constitutional labour law on citizenship does not require that the private authority of the employer be subject to all the same constraints as the public authority of the State; merely such constraints as are necessary to maintain the relationship as being one between *concitoyens*. Workers are willing to accept authority, but only if it is justified and accountable, in accordance with the 'democratic intuition' that comes with being a citizen. Citizenship does not require the horizontal enforcement by constitutional courts of the

gamut of socio-economic rights, and is not founded on questions of material distribution.[2] Certain rights should be protected in labour relations, but not for the sake of those rights *qua* rights, human, fundamental or otherwise – rather, to preserve the spirit of mutual citizenship in the labour relationship. Rights thereby function as defence mechanisms for workers against the social power of employers, upon which they can interact with 'the boss' as one citizen to another, notwithstanding the existence of institutional authority within the workplace. These rights must be 'non-convertible' – that is, they should override even freely-agreed contractual provisions to the contrary. This is because the public interest in their existence would be undermined if individual workers could (or were pressured to) waive these particular rights.[3]

The chapter then turned its attention to the practicalities of constitutional labour law. By the end of Chapter 5, we could see that our theory of constitutional labour law required and justified the following in practice: worker organisation, representation, participation and fair procedures in decision-making; dedicated public labour-related decision-making institutions and processes; and protection for civil liberties at work and against discrimination.

These practical requirements can be summed up in the values of participation and political independence – answering the concern about selectivity of rights from Chapter 2. Part III gave more details on the centrality of these values in driving doctrinal implementation of our theory, and examined case law from Ireland and Europe to draw lessons on that implementation. Chapter 6 focused on the complementarity between industrial and political democracy, giving a detailed examination of how participation in workplace governance both supports and is mandated by citizenship of a constitutional democracy. Constitutional labour law should help situate the employment relationship within a more democratic economy. The participation of workers, employers and their respective organisations in decision-making gives such decision-making machinery constitutional legitimacy, and helps workers develop political skills that transfer over to the public realm. In this way, the 'labour constitution' complements the 'political constitution' that facilitates participation

[2] Which is not to deny any connection between material inequality and the sustainability of democracy and the spirit of mutual citizenship – this point will be returned to below.
[3] For another perspective on this issue, see Vladimir Bogoeski, 'Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2022) Industrial Law Journal <https://doi.org/10.1093/indlaw/dwac020> accessed 8 August 2022.

by citizens and their representatives in political processes. Therefore, the best approach to a constitutional assessment of workplace democracy is based on the state's compelling interest in protecting its own democratic nature from the risks posed by an undemocratic economy, and the benefits for citizenship of worker participation in workplace decisions. Chapter 6 did not prescribe specific mechanisms for worker participation, advocating instead a 'mixed constitution' that could entail consultation structures, collective bargaining by trade unions, works councils, worker representation on corporate boards, *etc*. However, it did highlight trade unions as playing a particularly valuable role in protecting and promoting the citizenship of workers: first, by facilitating the sort of participation in workplace decision-making we have been discussing, and second through broader political activity. This means the state has good reasons to promote trade unionism and support unions, through constitutional labour law. This contributed to the work of bridging the divide between 'traditional' concerns of labour law (collective action to overcome inequality of bargaining power) and the sorts of civil liberties that will be examined in Chapters 9 and 10. Trade unionism is part of a broader political project, a necessary complement to those civil liberties in allowing workers to act as full citizens of a constitutional democracy.

Building on the insights in Chapter 6 about the importance of worker participation in decision-making, Chapters 7 and 8 undertook doctrinal analysis to illustrate how participation works in practice. There are three specific manifestations of participation required in constitutional labour law: labour representative organisations, fair procedures in disciplinary proceedings, and subsidiary regulatory institutions. Chapter 7 used Irish constitutional jurisprudence to illustrate practical issues in respect of participation internal to the workplace – both collective in the form of trade union activity, and individual in the form of fair procedures. It critiqued Irish constitutional jurisprudence on 'freedom of association' in the context of trade unions as an example of how liberal constitutionalism typically thinks about workers' organisations – arguing this is an impoverished way to understand the issues at stake for workers as citizens. It further extracted lessons on how to deal with the key concerns identified in Chapters 2 and 5 around horizontality, waiver and adaptation of rights within constitutional labour law. The chapter argued that the starkly differential treatment in Irish law of collective and individual participation is unjustified, and that Irish courts have failed to appreciate the connections and complementarity between them.

In Chapter 8, we looked at how the value of participation manifests outside the workplace, in the form of subsidiary regulatory institutions. We saw that the Irish courts have been sceptical of subsidiary regulatory institutions at least in part because of a perception that they will undermine the national parliament and, therefore, democracy in the state. It was argued that this overlooks how these institutions, and the representative organisations that participate in them, possess self-standing democratic legitimacy of their own, and are thus entirely justifiable vehicles for workers to exercise their citizenship. Allowing for some political oversight of subsidiary institutions offers a way to marry the 'labour constitution' and the 'political constitution', in a way that both recognises the legitimacy of (sufficiently representative) social partners, and satisfies the concerns about legislative autonomy and internalising the perspectives of other citizens. These institutions enhance the ability of workers to participate in shaping the important decisions that affect their lives in material and experiential ways. They build on participation within the enterprise itself.

Chapters 9 and 10 bridged the gap between 'labour rights' and 'civil liberties' in the context of constitutional labour law. This allowed us to understand constitutional labour law in a way that resolves the problems identified in Chapter 2, a way that encompasses both traditional labour rights and the kinds of civil liberties that seem at first glance to fit uneasily within labour law. Marrying these seemingly disjunctive areas of law was necessary to explain and justify constitutional labour law as it has developed. Chapter 9 focused on the theoretical importance of political independence. Four justifications for civil liberties at work were offered: contestation, diversity, moral independence and integrity. The rights these values inspire may need to be subject to adaptation and balancing – this was to come in Chapter 10. The important thing is that the four justifications given function as values underlying this area of constitutional labour law, and as such should inform any acts of interpretation and adjudication in this field.

Chapter 10 used European Court of Human Rights case law to illustrate the sorts of civil liberties issues that crop up in constitutional labour law: issues of workers' freedom of expression, the free practice of religion or philosophical belief, privacy, and non-discrimination. How courts have dealt with the issues of waiver and adaptation of the rights considered here is important for a theory of constitutional labour law. Employers often try to impose constraints on the moral and political beliefs or actions of their workers – sometimes with the best of intentions to protect vulnerable customers and staff; often

caught up in broader social trends and fearful of guilt by association with public controversy. This stifles diversity and requires workers compromise their beliefs in order to keep their job, costing them their integrity and imperils their right to participate as citizens in a constitutional democracy.

Constitutional labour law should resist this. A worker's moral beliefs, religious practices or political activity rarely pose a serious risk of disrupting the productive process, which is of course the fundamental concern of the capitalist enterprise. Those disruptions that do arise would be better managed by greater worker participation in internal decision-making. There is little reason to privilege the decisions of autocratic managers, so the more management reserves the power to set working conditions to itself, the more it should be obliged to accommodate workers' rights to freedom of expression, association, privacy, freedom of conscience, free practice of religion, non-discrimination, *etc*. As argued in Chapter 10, this approach to constitutional labour law would incentivise employers to be more democratic, demonstrating the complementarity of the values of participation and political independence. That said, the values of civil liberties are themselves necessary to make participation function properly. Contestation remains the lifeblood of democracy, alongside the willingness to exchange diverse ideas and experiences from a position of personal integrity. A population of good citizens will not come about from employers encouraging their workers to abandon the free development and expression of their beliefs.

Conclusion and future research

The specific research questions tackled in this thesis arise in a broader context of public and political resonance. In recent years, the professional has become political, as politics increasingly finds its way into the workplace. Meanwhile, there is widespread anxiety about inequality and the stratification of society, and declining social trust and political co-operation. It is time for new ways of organising economic life. The 'democratic intuition' that characterises active citizenship in a Western liberal democracy sits uneasily beside the obvious prevalence of workplaces where workers have no meaningful say over their conditions and the running of businesses. These modern socio-political trends give broad significance to a theory that can explain and justify how courts should handle issues of labour organisation and representation, institutional regulatory structures that empower

workers, and how to preserve workers' political independence and the ability to participate in the political process.

There is, of course, much more that could be said on this theme. For example, this thesis did not engage with the relationship between citizenship and discrimination on grounds other than religion. Another fertile area would be to introduce nuance to our discussion of employers and moral formation, by examining 'ethos employers' in more detail.[4] Future research should determine which sorts of organisations should be allowed rely on a 'moral mission' to impose conditions on workers that would otherwise be unacceptable under this theory, and elaborating on the extent of this extra leeway. Empirical data is needed on to what extent workers are willing to accommodate colleagues' objections to ways of organising productive activities, from rescheduling shifts around religious festivals to conscientious objection.[5]

This thesis was deliberately non-prescriptive on institutional frameworks for worker participation in decision-making, both inside and outside the workplace.[6] Future research should focus on how different institutional designs promote different aspects of citizenship, and how these relate to broader constitutional concerns.[7] There is more to say on the precise

[4] See further Yves Stox, 'Religious-Ethos Employers and Other Expressive Employers under European and Belgian Employment Law' in Marie-Claire Foblets and Katayoun Alidadi (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Routledge 2012) ch 8; Katayoun Alidadi, *Religion, Employment and Equality in Europe* (Hart Publishing 2017); John Adenitire (ed), *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019); Lucy Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: the Need for Proportionality' (2019) 5(1) International Labor Rights Case Law 75; Andrew Koppelman, *Gay Rights vs Religious Liberty? The Unnecessary Conflict* (Oxford University Press 2020).

[5] For some research in this area, mostly focused on the *employer's* perspective, see: Caroline Cintas, Berangere Gosse and Eric Vatteville, 'Religious identity: a new dimension of HRM? A French view' (2013) 35(6) Employee Relations 576; Andrew Hambler, 'Managing workplace religious expression within the legal constraints' (2016) 38(3) Employee Relations 406; Pooya Tabesh and Phillip M Jolly, 'Beyond the law: processes underlying religious accommodation decisions' (2019) 57(5) Employee Relations 1254; Caroline Cintas, Ying-Fei Héliot and Pierre-Antoine Sprimont, 'Religious accommodation in France: decoding managers' behaviour' (2020) 43(1) Employee Relations 83; Hugo Gaillard, 'Managing religion at work: a necessary distinction between words and deeds: A multiple case study of the postures facing religious expression in French organizations' (2022) 44(4) Employee Relations 744.

[6] The author has engaged with some of these questions in other published work: see Alan Eustace, *Collective Benefit: Harnessing the Power of Representation for Economic and Social Progress* (FÓRSA 2021), 'A Shock to the System: Sectoral Bargaining Under Threat in Ireland' (2021) 12(2) European Labour Law Journal 211, 'If It Walks Like Misconduct and Quacks Like Misconduct… It's "Poor Performance"? *O'Donovan v Over-C Technology Ltd* [2021] IECA 37' (2021) 18(2) Irish Employment Law Journal 31, 'The *Electrical Contractors* Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation' (2022) 85(4) Modern Law Review 1029, and 'All Work and No Fair Play? The Right to Fair Procedures in Employment Disciplinary Proceedings' (Dublin University Law Journal, forthcoming).

[7] See for some discussion, Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014); Isabelle Ferreras, *Firms as Political Entities: Saving Democracy Through Economic Bicameralism* (Miranda

requirements of fair procedures in disciplinary proceedings, including on when circumstances might demand legal representation, rather than a trade union official. The relationship between waiver and probation is similarly crying out for clarification.[8]

From the beginning, this thesis took the view that although 'bread and roses' issues like pay, health and safety, leisure and working time are vital to the interests and dignity of workers, they were only of tangential relevance to citizenship. The reasons for excluding 'socio-economic' rights to particular material conditions from our theory have been explained, and the practice of courts in neglecting these issues defended – at least within the context of *constitutional* labour law. That these issues are inappropriate for regulation by means of constitutional labour law, does not mean that our theory of citizenship is irrelevant for designing ordinary labour law. We saw that historical elite concerns about the inclusion of the working class in the body of citizenry were driven by anxiety that workers' material conditions are such that they cannot meaningfully participate in public life. This suggests that labour law protecting material conditions may give indirect support to citizenship in ways that should be explored further in future research. In particular, working time regulation seems apt for examination of how it gives workers the time to engage in political activity, and to pursue education or moral formation for that purpose.[9]

All this must await future research projects. To conclude this thesis, constitutional labour law allows workers to play a participatory role in political and civic-social life, as full, equal members of the community – that is, citizens. In this way, labour law is part of a broader vision of political economy. It allows workers to overcome and reform a society based on class, establishing and maintaining a society based on citizenship in its place. As a political project, labour law is also a constitutional project, for it aims to facilitate participation in the government of the state, structure power in society, and integrate

Richmond Mouillot tr, Cambridge University Press 2017); Caroline Kelly and Joo-Cheong Tham (eds), *Democracy, Social Justice and Trade Unions* (Anthem Press 2021); Anthony Forsyth, *The Future of Unions and Worker Representation* (Hart Publishing 2022).

[8] As exemplified by *O'Donovan v Over-C Technology Ltd* [2021] IECA 37.

[9] For discussion of the relationship between working time and citizenship, see Alex Gourevitch, *From Slavery to the Cooperative Commonwealth* (Cambridge University Press 2015) 25, 37, 144-46, 156ff; Samuel R Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225, 271. See also Dana Villa, *Public Freedom* (Princeton University Press 2008) ch 5. For a broader discussion of how working time regulation can pursue human and civic rights aims, see Alan Bogg, 'The regulation of working time in Europe' in Alan Bogg, Cathryn Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar Publishing 2012) ch 12, 294ff.

‘private government’ into the state and its democratic decision-making structures. To do so, labour law needs to protect workers as human beings with dignity and agency, but also as *citizens* with standing and legitimate claims in the political arena of a constitutional democracy. It must protect their political independence from the influence of employers, and enable them to develop their political skills through participation in decision-making in the workplace and in regulatory institutions. That is the purpose and programme of constitutional labour law.

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